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IN THE
Supreme Court of the United States
OCTOBER TERM, 1946

F. C. MOSER, *Petitioner,*

vs.

NEW YORK LIFE INSURANCE COMPANY, a corporation, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, and BRIEF IN SUPPORT OF PETITION

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1446 Dexter Horton Building,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Fred M. Vinson, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your Petitioner respectfully shows:

SUMMARY STATEMENT OF THE MATTER INVOLVED

The petitioner's Amended Complaint contained four causes of action. The judgment of the lower courts as to the First, Second, and Fourth Causes of Action has been acquiesced in by petitioner. The action of the lower courts as to the Third Cause of Action is herewith presented to the United States Supreme Court for its adjudication. The issue involves the rights of so many thousands of Nylic life insurance agents and is so very vital to millions of respondent's policyholders throughout the world, that petitioner deems that the final adjudication of this highest court should be sought upon the question.

Petitioner's Third Cause of Action in his Amended Complaint was disposed of prior to trial by the trial court rendering a Memorandum Opinion that such Third Cause of Action failed to state a claim upon which relief can be granted (R. 147-152) and thereafter entering an order dismissing such Third Cause of Action (R. 145-146).

The Third Cause of Action in the Amended Complaint, with pertinent references to explanatory facts detailed in paragraphs incorporated from the First and Second Causes of Action, from the Petitioner's Bill of Particulars, and from contracts attached as Exhibits, sets forth petitioner's claim for damages for respondent's wrongful action in this case.

Therefrom it appears that petitioner became a part-time agent of respondent on October 7, 1907, and a full-time agent on January 1, 1908. Subsequently, in July, 1910 (R. 27) respondent formed among its agents a contract of benefits and compensations designated by it as "Nylic," at which time the parties then entered into "Nylic" contractural relations. The word "Nylic" is formed from the first letters of the words "New York Life Insurance Company."

The Nylic contract signed by petitioner and accepted by respondent (R. 493) reads:

> To the New York Life Insurance Company,
> No. 346 Broadway, New York City;
> August 17, 1910, in re Nylic No. 2.
>
> Gentlemen: I hereby make application for membership in Nylic, under the terms and conditions of Nylic as set forth in the company's

pamphlet entitled "Nylic No. 2," Edition of July, 1910, and in consideration of your acceptance of this application I agree to observe and be bound by each and all the rules and regulations, terms and conditions of Nylic as set forth in said pamphlet, and especially agree so long as I remain a member of Nylic to devote all my time, talents and energies to the company's service in soliciting personally for business.

I have devoted my whole time to the company's service in soliciting for applications during the years 1908, 1909, 1910, and elect to take time credit for the years immediately preceding January 1, 1911, following, to-wit: 1908-1909-1910.

I was born on the 14th day of January, 1879.

Yours truly,

F. C. MOSER.

Accepted this 26th day of September, 1910, time credit to be given for the years 1908, 1909 and 1910.

NEW YORK LIFE INSURANCE COMPANY,

By Thomas A. Buckner,

Vice-President.

Nylic No. 2 (Ex. "F," R. 91-112) which is made a part of petitioner's written Nylic contract just set forth (R. 493) is an elaborately detailed recital of facts beneficial to respondent's millions of policy-holders and to petitioner as respondent's agent. Said Nylic contract is beneficial to respondent's millions of policy-holders for the following reasons: (1) it immeasurably reduced respondent's agency expense; (2) it materially lengthened the period of continuous service of the Qualifying Nylic agents; (3) it engendered a higher degree of honesty, loyalty, fidelity and achieve-

ment among respondent's Nylic agents; (4) it created a fiduciary relation between respondent and its Nylic agents; (5) and in finality it created—which was its principle objective—a corps of highly experienced, dependable life-time Senior Nylic agents.

Obviously, the principle benefit that petitioner was to receive from his Nylic contract was that ultimately he would become a Senior Nylic agent whose contract could be terminable only for cause, thereby permitting petitioner to cash in on his experience, good-will and extensive clientele which he had built during his 20-year probationary period.

Apropos, the opinion of respondent's Inspector of Agencies, Mr. R. E. Whitney, is highly pertinent. He wrote to petitioner under date of January 5, 1928, as follows (R. 135):

> "Twenty years of the kind and character of service you have rendered in your connection with the New York Life Insurance Company entitles you to more than congratulations, even more than a *permanent* income with our Company.
>
> "The fact that you have built up such a wonderful clientele which will so much for your future business and future profit is one of the greatest benefits you will deprive from your great work in the past. You have made a record to be proud of."

In this same connection, Mr. Walker Buckner, respondent's Vice-President, under date of December 29, 1927, wrote the following pertinent paragraph to the petitioner (R. 136):

> "I trust that in your becoming a Senior Nylic

you will enjoy the fruits of your experience, the same as so many other Senior Nylics have, by a largely increased yearly production."

Of a similar tenor, are the letters to petitioner by Second Vice-President L. Seton Lindsay, Inspector of Agencies, A. S. Elford, and Agents' Counselor, Mr. E. E. Andrews.

Mr. Lindsay wrote, December 30, 1927, as follows (R. 137):

"Our New Year's Bulletin carries the announcement that subject to final qualifications you are now a Senior Nylic. Please let me be among the first to congratulate you.

"There is a feeling of satisfaction in accomplishing a purpose, and when the effort required to reach the goal extends over a period of twenty years it is indeed a real achievement."

Mr. Elford, under date of January 25, 1928, wrote as follows (R. 138):

"Your Senior Nylic membership, along with your great continuity of purpose for twenty years in Nylic, is worthy of my warmest congratulations to you. Your personality and presence here with us in Seattle is a source of great satisfaction to me and strength to the agency."

Mr. Andrews, under date of January 3, 1928, wrote as follows (R. 139-40):

"My dear Old Timer: At last the above greeting is entirely appropriate, for you have definitely landed among the Old Timers. If you run true to form and precedent, these next few years will be the biggest and most successful of your entire career."

All Nylic agents were also given writing agreements in the form of agency contracts. These agency agreements of necessity would have to be changed from time to time and from period to period largely due to either improvement or recession in business, thereby either increasing or lowering the Nylic's commission; or a new type of policy would be adopted and commissions therefor would have to be made in a new agreement; consequently these temporary agreements were subject to termination on 30 days' written notice by either party, with or without cause, however without effecting or altering the foundational Nylic contract. Such agency agreements are here designated as Exhibits "C" (R. 80-90) and "D" (R. 50-65). It is a pertinent fact that while the parties changed or altered the temporary agency agreements from period to period such as Exhibits "C" and "D," the master Nylic contract has never been changed or altered.

As petitioner more extensively cites later on in this brief the courts can take judicial notice of governmental records. Mr. Thomas A. Buckner, Chairman of the Board of the New York Life Insurance Company, while testifying before the Temporary National Economic Committee, in 1939, gave adequate reasons why the Company's agency agreements must be cancellable upon 30 days' written notice. He testified as follows:

> "Many new elements have entered into the picture in the last 10 years so that all previous calculations and previous methods of doing business

have to be revised. In this connection the company officials have to take into account the rise and fall in business cycles, the effect that conflict with other nations has upon security values, whether the values consist of real estate or stocks and bonds, economic uncertainty, political uncertainty, safety of assets, and amount of reserve." (page 1425)

Hearings before the Temporary National Economic Committee, Congress of the United States 76th Congress, 1st Session. Public Resolution 113, Part 4 Life Insurance, pages 1424-1425.

Each of such agency agreements contained a 30-day cancellation clause (Ex. B, R. 76, par. 18; Ex. C, R. 86, par. 18; Ex. D, R. 58, par. 20). During the 20-year qualifying period the Nylic contract was likewise terminated if the agency agreement was permanently cancelled (Ex. F, R. 111-112, par. XII). But subsequently, after petitioner became a Senior Nylic, the termination of the agency agreement by respondent, could not alter or affect petitioner's Senior Nylic membership (Ex. D, R. 65, par. 23; Ex. F, R. 111-112, par. XII). Petitioner's Amended Complaint further recited:

"That said 'Nylic' on and after September 26, 1910, was combined with each successive agency agreement entered into between the plaintiff and the defendant corporation and thereby became a part of the operating contracts under which the parties hereto operated; that as of January 1, 1910, the renewal commissions paid by the defendant to the plaintiff were reduced and the payments under 'Nylic' were supplied to replace

in whole or in part the amount of such reductions in renewal commissions; and the payments under 'Nylic' became a part of the compensation agreed to be paid to the plaintiff for the services rendered to the defendant by the plaintiff.

"That the qualifying period of 'Nylic,' already referred to, was from January 1, 1908, to January 1, 1928, according to the terms of 'Nylic No. 2,' as set forth in 'Exhibit F' hereto attached. That on January 1, 1928, after twenty (20) years of full-time, continuous and faithful service to the defendant, plaintiff qualified and was accepted as a 'Senior Nylic' by the defendant; that it was an express and implied provision in his employment contract that he was to be employed and was to work for defendant for life, unless said contract was terminated for cause.

"That in qualifying for 'Nylic' and in working for defendant continuously and faithfully for approximately twenty-eight (28) years, plaintiff became closely associated with the defendant company, built up a large clientele which would purchase policies from only the defendant company, and plaintiff in devoting himself exclusively to the work of defendant corporation as a profession gave up his career in banking and spent the most fruitful years of his life in the services of the defendant company. Nevertheless, on or about the 23rd day of July, 1936, the defendant arbitrarily, in bad faith and without cause terminated and cancelled the plaintiff's said contract with the defendant already referred to because of malice and to avoid payment of benefits and renewal and conversion-commissions to the plaintiff, thereby preventing the plaintiff from further performing his contract with the defend-

ant and disqualifying him from earning a livelihood in the only profession and for the only company he was fitted and trained to serve.

"That the plaintiff has in every manner complied with the terms of his contract with the defendant except insofar as he has been prevented by the action of the said defendant in wrongfully discharging the said plaintiff. That the plaintiff has been maliciously and wrongfully prevented by the defendant from further performing his contract with the defendant in violation of all express and implied promises and representations made by the defendant and its agents to the said plaintiff; that after relying on said promises and representations, the plaintiff has in the prime of life been prevented by the defendant from earning a livelihood in his life's profession either with the defendant or any other life insurance company, and the defendant has maliciously and wrongfully taken and deprived the plaintiff of the benefit of the said plaintiff's experience, association and good-will built up over a period of twenty-eight (28) years of service in the defendant's organization."

For 15 years prior to his discharge petitioner had been earning an annual-compensation of $28,500.00 per year, and his prayer for damages was for such sum during the remaining expectancy years of the Nylic contract, or a total of $485,864.42 (R. 37).

The trial court sustained Respondent's Motion to Dismiss the Third Cause of Action above set forth. The reasons assigned by the trial court in its memorandum opinion (R. 147-152), were that the Agency Agreement (Ex. D, R. 50-64, par. 20, page 58),

contained the provision, "Either party hereto may without cause terminate this agreement upon 30 days' written notice;" (R. 147) that a Senior Nylic does not have to be an agent for life (R. 149) with permanent employment (R. 150) and that such Senior Nylic had exchanged his right to such life agency by accepting the terminable agency (Ex. D, R. 50-65) entitling such agent to greater compensation (R. 151). The formal order dismissing the Third Cause of Action duly followed (R. 145-146).

Upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit, said court duly affirmed the judgment of dismissal by the lower court, without rendering an opinion of its own (R. 1199).

JURISDICTIONAL STATEMENT

Petitioner is a resident of the State of Washington. Respondent is a foreign corporation doing business in the State of Washington (R. 26-27). The judgment of the United States Circuit Court of Appeals for the Ninth Circuit, affirming the judgment of the District Court, was filed and entered on March 11, 1946. The order denying the Petition for Rehearing was filed by the said Circuit Court of Appeals on June 21, 1946 (R. 1200) and an order was thereafter entered by said court withholding its mandate until July 31, 1946, to enable petitioner to file his Petition for a Writ of Certiorari herein. It is contended that the United States Supreme Court has jurisdiction to review the judgment here in question under Section 240 of the Code of Civil Procedure, as amended by 28-

U.S.C.A., Section 347. The questions involved in this case are of transcending importance; (1) to the respondent's millions of policy-holders, which include petitioner; (2) to the respondent's many thousands of qualifying and Senior Nylic agents and their dependents; (3) to all life insurance companies who have to compete with the intrigues of the Nylic contract; (4) because through blacklisting and restrictive Nylic covenants the respondent has prevented petitioner from earning his customary livelihood either with respondent or any other life insurance company.

QUESTIONS PRESENTED

1. Petitioner as a Senior Nylic agent of respondent is under contract "so long as he remains a member of Nylic, to devote all his time, talents, and energies to the Company's service in soliciting personally for business" (R. 97), "shall not enter the service of any other life insurance company" (R. 106), and "can have no other business or occupation for profit or gain" (R. 109). Can respondent without cause dismiss petitioner as its agent and refuse to permit petitioner to earn his usual commissions for insurance during the existence of his Senior Nylic contract?

2. Since Senior Nylic agents are bound to work only for respondent is there not a mutually correlative duty on the part of respondent that such Senior Nylic agents shall have the right to regular employment by the company the same as other Senior Nylic agents of the Company?

3. If such dismissal of a Senior Nylic agent from

employment without cause is effectuated by respondent, should not petitioner receive damages for such breach of contract?

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

Obviously, since the judgment of the United States Circuit of Appeals for the Ninth Circuit was merely an affirmance of the opinion of the United States District Court for the District of Washington, Northern Division, it is necessary to examine the reasoning of the Opinion of the District Court and the conclusions drawn therefrom by the District Judge (R. 147-152).

According to such Memorandum Opinion there seem to be three major reasons advanced by the district judge for holding that Petitioner's Third Cause of Action failed to state a claim upon which relief could be granted.

The points thus raised in such Memorandum Opinion, and petitioner's answers thereto, are set forth at length in the Brief attached to this Petition. Consequently, for the purposes of this Petition it would seem sufficient to make merely a brief statement herein of such points and answers.

Point I. The court asserts that Petitioner's Agency Contract with respondent (Ex. D, R. 50-65) contained a cancellation clause whereby the contract was terminable upon 30 days' written notice (R. 147-148-151-152).

Answer. The cancellation of the agency contract "in no way could alter or affect Petitioner's Senior Nylic membership" (Ex. D, R. 65, par. 23). Admittedly petitioner still was bound by his Senior Nylic contract and the cancellation of the agency contract did not cancel the Nylic contract but left the respective parties thereto under the duties and obligations of such Nylic contract. Petitioner still continued subject to the Nylic clauses that he could "Have no other business or occupation for profit or gain" (Ex. F, R. 109, par. 1) and could "not enter the service of any other life insurance company" (Ex. F, R. 106, Senior Nylics). Petitioner contends that so long as he continues to be a Senior Nylic there is a reciprocal duty on the part of respondent to permit petitioner to earn compensation from the respondent on the same terms and conditions as are accorded other Senior Nylic agents.

Point II. The court asserts that there is no language in petitioner's Nylic contract (R. 493 and Ex. F, R. 91-112) which entitles petitioner to "life" or "permanent" employment by respondent (R. 148, 149, 150).

Answer. The recent decisions of this court have established the doctrine of "fair play and substantial justice." Under such a doctrine, as established also by the Supreme Court of the State of Washington, since petitioner by his Senior Nylic contract could not work elsewhere or for any other insurance ocmpany, there is implied a corresponding and correlative obligation on the part of respondent to permit petitioner to earn his insurance commissions under the same

terms and conditions as are accorded other Senior Nylic agents.

International Shoe Co. v. State of Washington, 68 Sup. Ct. Rep. 154, at 158, 160;

Byrne v. Bellingham Cons. School Dist., 7 Wn.(2d) 20 at 29-30;

McCartney v. Glassford, 1 Wash. 579 at 581-582.

Point III. The court asserts that petitioner exchanged his right to a life agency under his Nylic contract, if he had such life agency, for a terminable agency (Ex. D, R. 50-65) entitling him to a higher compensation (R. 151-152).

Answer. There is no allegation in the complaint, nor any factual matter stated in any of the exhibits nor in the Bill of Particulars, to substantiate the conclusion of the District Court either that petitioner exchanged any provisions of his Senior Nylic contract for an Agency contract; (Ex. D, R. 50-65) or, that under such agency contract petitioner became entitled to a higher compensation. Petitioner demonstrates with particularity in his Brief attached hereto, the fallacy of any such reasoning by the District Court.

In addition to the foregoing reasons, petitioner is entitled to have his writ granted for the following *special, important and legal reasons*:

(a) The petitioner is a Senior Nylic. There are over one thousand (1,000) living Senior Nylics. Most Senior Nylics are married and have family and relative obligations or dependents. In addition there are probably about five thousand (5,000) Freshmen,

First Degree, Second Degree and Third Degree Nylics (also called Qualifying Nylics) who are struggling to acquire the Senior Nylic status. As the Nylic contract admittedly is the back-bone of the New York Life Insurance Company agency business and, no doubt, will be practiced for many years in the future (it has now been practiced by respondent for 50 years) there will be literally tens of thousands who will become qualifying and senior Nylics. Thus, all in all, this action involves directly and indirectly many thousands of individuals and will constantly involve many more thousands, since each year a substantial number of qualifying Nylics acquire Senior Nylicship.

(b) The Nylic contract and the Nylic agents have made the New York Life Insurance Company the great and powerful company that it is. The New York Life is a *mutual company* numbering a few million policyholders, who will be affected either favorably or unfavorably by this action. The Nylic contract either provides life employment for a Senior Nylic as contended herein by petitioner or else it is a delusion and a fraud, and as such it should be exposed. If the Nylic contract is the contract as alleged and contended by petitioner, then the policyholders of the company will profit to the extent of millions of dollars; if it is not, and is the contract that respondent is attempting to establish in order to defeat this action and hedge liability, then, in that event the policyholders will lose millions of dollars. The whole esprit de corps of all of the Nyic agents of respondent is affected by this action.

The Nylic agents are the life-blood of respondent

company. Anything that adversely affects this large body of just plain folks and their dependents who are outstanding for their loyalty, honesty, fidelity, achievements, and dependability will commensurately adversely affect the policyholders of this company. If this Nylic contract has the status as set forth by petitioner the policyholders in the future will not only secure more Nylic agents, but better Nylic agents, which translated into money will mean millions of dollars to them. If it is the contract that respondent in this action argues that it is, then, in that event the company in the future will unquestionably secure fewer Nylic agents and of an inferior quality, which translated into money will mean the future loss of millions of dollars to respondent's policyholders. By every rule of law, sound business, fair play and substantial justice it will be markedly to the future financial welfare of the policyholders of this mutual company that this court clarify this Nylic contract in the reasonable status as contended by the petitioner.

(c) This Nylic contract must be construed in the light of the laws of the State of Washington. The District Court and the Circuit Court of Appeal have not taken judicial notice of, nor given legal effect to, the Washington Supreme Court cases which should have a decided bearing on this action. Such cases are set forth at length in the attached Brief.

(d) Neither the District Court nor the Ninth Circuit Court of Appeals have taken judicial notice of, nor given legal effect to, other applicable federal and state decisions and especially the decisions of the United States Supreme Court among which are those

which involve the "Traditional Notions of Fair Play and Substantial Justice" hereinafter cited.

(e) This respondent through restrictive covenants in its Nylic contract and by causing petitioner to be blacklisted by other companies and by disseminating to them false information about petitioner so that they will not employ him, have had the effect and were intended to have the effect of depriving petitioner of his lawful right to earn his livelihood.

The New York Life Insurance Company is the only life insurance company which practices a Nylic contract. All other companies use a single straight renewal contract. The New York Life Insurance Company secures many of its Nylic agents in competition with other companies by representing to prospective agents that the Nylic contract has the status which petitioners herein contends. Moreover all other companies have been propagandized by petitioner into believing that the Nylic contract has this same status. If this court shall decree that the Nylic contract does not have this status (which respondent's competitors are dying to know) but has the status which the respondent in this action contends, then the many powerful competitors of respondent will so expose and blast this Nylic contract and this whole Nylic scheme (as they rightfully should) that the policyholders of the Company will suffer tremendously by not only securing fewer agents, but agents of an inferior quality, which situation translated into money will mean the eventual loss of millions of dollars. Any construction put upon the Nylic contract other than that contended by petitioner and so represented and interpret-

ed by respondent for petitioner, will destroy the faith of all Nylics in the Senior Nylic status and undermine the inestimable value of the esprit de corps and loyalty which the Nylic contract has thus far engendered in all Nylics, thereby causing the policyholders serious losses in prestige and money.

Wherefore your petitioner prays that a Writ of Certiorari issue under the seal of this court, directed to the Circuit Court of Appeals, for the Ninth Circuit, commanding said court to certify and send to this court a full and complete transcript of the record and of the proceedings of the said Circuit Court of Appeals had in the case number and entitled on its docket No. 11073, *F. C. Moser*, Appellant, v. *New York Life Insurance Company*, a corporation, Appellee, to the end that this cause may be reviewed and determined by this court as provided for by the Statutes of the United States; and that the judgment herein of said Circuit Court of Appeals be reversed by this court, and for such further relief as to the court may seem proper.

Dated this 23rd day of July, 1946.

DANIEL B. TREFETHEN,
Attorney for Petitioner.

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OPINIONS OF COURTS BELOW

The opinion of the U. S. District Court of the State of Washington was rendered March 12, 1943 (R. 147-152). The judgment of the Circuit Court of Appeals for the Ninth Circuit, affirming the lower court's opinion, was rendered March 11, 1946 (R. 1199). The order denying Petitioner's Petition for Rehearing by the Circuit Court of Appeals was entered June 21, 1946 (R. 1200).

JURISDICTION

1. The date of the judgment to be reviewed is June 21, 1946, when the Petition for Rehearing was denied by the Circuit Court of Appeals for the Ninth Circuit.

2. The statutory provision which is believed to sus-

tain the jurisdiction of this court is Section 240 of the Code of Civil Procedure, as amended by 28, U.S.C.A., Section 347.

3. The opinion of the Circuit Court of Appeals for the Ninth Circuit that though petitioner is bound by his Senior Nylic contract whereby he "can have no other business or occupation for profit or gain" and "shall not enter the service of any other life insurance company," yet respondent does not have the reciprocal duty to employ petitioner to sell its insurance policies, is in conflict with the decisions of the Supreme Court of the State of Washington in the cases of *Byrne v. Bellingham Cons. School Dist.*, 7 Wn.(2d) 20 at 29-30; *McCartney v. Glassford*, 1 Wash. 579 at 581-582; and *International Shoe Co. v. State of Washington*, 66 S. Ct. Rep. 154, 158, 160.

STATEMENT OF THE CASE

This case has already been stated in the preceding petition for the Writ of Certiorari which is hereby adopted and made a part of this brief.

SPECIFICATION OF ERRORS

The Circuit Court of Appeals for the Ninth Circuit erred in affirming the order of the U. S. District Court dismissing Petitioner's Third Cause of Action, and in refusing Petitioner's Petition for Rehearing.

ARGUMENT

SUMMARY OF ARGUMENT

Point I. Cancellation of the agency agreement (Ex. D) did not terminate petitioner's right of employment by respondent.

Point II. Senior Nylic agents are entitled to employment by respondent during the existence of the Senior Nylic contract.

Point III. Petitioner never exchanged his Senior Nylic agency right of employment for a terminable agency at a higher compensation.

Point I

Concellation of the agency agreement did not terminate petitioner's right of employment by respondent.

To one not versed in the intricacies of life insurance agents employment contracts and the interpretation thereof, the obvious opening inquiry is, What is this Nylic contract?

Petitioner asserts that the Nylic contract is the most diabolical unilateral slave contract that was ever devised by a huge designing corporation to first lure its victims (the Nylic agents) and thereafter either enslave them for their natural lives or else confiscate all of their withheld pay, which pay was withheld to bind them to respondent.

The Nylic contract governs two inordinately long periods of employment and compensation—the first period embracing 20 years commonly called the probationary or qualifying Nylic period and the second

period designated by respondent as the Senior Nylic or life-time period.

The Nylic contract says to the Qualifying Nylic agent you must work exclusively and continuously for respondent during the first 20 years during which time you cannot have any dealings with any other life insurance company; you cannot accept brokerage business or employ sub-agents; that only your personally solicited and procurred business will count in Nylic; that you can have no other business or occupation for profit or gain; that you cannot go to or solicit business in any territory in which Nylic is not practiced by the respondent; that you must produce each year during the 20 years a designated sum of new business; that if you fail in any of these matters you will be discharged and the respondent will confiscate all of your withheld pay and other sums; that if you resign during said 20 years the respondent will confiscate all of your withheld pay and other sums; that if the respondent discharges you during the said 20 years, with or without cause, the respondent will confiscate all of your withheld pay and other sums.

The Nylic contract says to the petitioner as a Senior Nylic that you cannot enter the service of any other life insurance company; that you can have no other business or occupation for profit or gain; that if you fail in this wise the respondent will discharge you and confiscate all of your life-time Senior Nylic monthly income and other sums; that if you work at all, you must work exclusively for respondent for so long as you are a member of Nylic.

"Nylic No. 2" is set forth at length in the record

(R. 91-112). The following representations and statement of facts are taken therefrom. "It has been established in order to *give permanency* and character to the work of the soliciting *agent*" (R. 92). "Nylic will * * * stop what may be called 'waste' in the creation of our business" (R. 93). "The first problem that faces the management of the agency department in a growing and successful company is how to secure, educate *and keep* agents of the right character and capacity" (R. 93). "If a company has in its employ several thousand agents an inspection of its books will show that their average term of service is only a few years" (R. 94). "Any plan, therefore, which has for its object *permanency* of service, inseparably associated with personal honesty, loyalty, fidelity, and achievement on the part of an *agent* must tend to reduce expenses and at the same time elevate the business of life insurance. It is believed that Nylic directly subserves these purposes" (R. 95). "Any plan, therefore, which shows a man who is about to enter upon the business of life insurance his bests interests all lie in persistent and continuous service * * * must benefit the profession. Nylic is such a plan" (R. 96).

On July 23, 1936, Appellant's agency agreement (Ex. D., R. 50) was terminated (R. 390). Such termination by the ompany was without just cause and was legally indefensible.

HOWEVER, SUCH TERMINATION NOTICE DID NOT CANCEL APPELLANT'S SENIOR NYLIC CONTRACT. The agency agreement (Ex. D) is specific in stating "IT BEING UNDERSTOOD AND

AGREED THAT THE EXECUTION OF THIS AGREEMENT SHALL IN NO WAY ALTER OR AFFECT THE SECOND PARTY'S SENIOR NYLIC MEMBERSHIP HERETOFORE ACQUIRED SUBJECT TO ALL THE RULES, REGULATIONS AND CONDITIONS OF NYLIC No. 2 "(R. 65). IT IS THE APPELLANT'S CONTENTION THAT SO LONG AS HE IS A SENIOR NYLIC AND, AS SUCH, AN AGENT OF THE COMPANY, BOUND BY ITS RESTRICTIVE COVENANTS RECITED HERENABOVE, THAT HE "CAN HAVE NO OTHER BUSINESS OR OCCUPATION FOR PROFIT OR GAIN" (R. 109) AND THAT HE SHALL NOT ENTER THE SERVICE OF ANY OTHER LIFE INSURANCE COMPANY (R. 106). THERE IS INHERENT IN SUCH RELATIONSHIP THE CORRELATIVE AND RECIPROCAL IMPLIED RIGHT THAT THE COMPANY SHOULD PERMIT APPELLANT TO SOLICIT BUSINESS FOR THE COMPANY, AND RECEIVE COMMISSIONS THEREFOR, UPON THE SAME TERMS AND CONDITIONS AS OTHER SENIOR NYLICS ARE PERMITTED TO EARN THEIR LIVING.

According to the memorandum opinion of the lower court (R. 151) "the parties agreed that the agency might be terminated by either party without cause *but that the Senior Nylic membership should nevertheless continue.*"

THUS, WHILE APPELLANT REMAINS A SENIOR NYLIC HE REMAINS AS AN AGENT OF THE COMPANY AND AS SUCH AGENT IT

IS IMPLIED THAT HE CAN CARRY ON HIS LIFETIME BUSINESS OF EARNING HIS COMMISSIONS FOR WHICH THE COMPANY SHOULD COMPENSATE HIM.

The result of Paragraph 23 (Ex. D, R. 65) *supra*, is either to make the employment contract subservient to all the rights heretofore acquired by appellant under Nylic No. 2 (Ex. F), or in any event to render the effect of the execution of the employment contract so uncertain and ambiguous as to allow the introduction of parole evidence as outlined in appellant's bill of particulars (R. 125).

The bill of particulars sets out the following facts in support of the complaint:

> "A. S. Elford, in the capacity of Inspector of Agencies of defendant's Western Department in Seattle about August 1, 1928, represented to plaintiff that Agency Agreement, Plaintiff's Exhibit 'D' was simply a commission contract and that Section 20 of the Agency Agreement (plaintiff's Exhibit 'D') did not apply to plaintiff as a Senior Nylic."

Evidence of this nature is admissible whenever there is an uncertainty as to the nature of an instrument or the intention of the parties to execute the contract; thus, conversations during negotiations may be shown in construing a contract in case of doubt as to meaning of words.

Joy v. Rousseau (Cal. App.) 236 Pac. 972.

Intention of parties to an ambiguous contract may be shown by oral testimony and circumstances surrounding a contract.

Russell v. Mutual Lumber Co. (Wash.) 246 Pac. 580;

Causten v. Barnette (Wash.) 96 Pac. 225.

Petitioner is entitled also to the benefit of the rule where the instruments are prepared by one of the parties to the contract that in event of any uncertainty or ambiguity those instruments are to be construed more strongly against the parties preparing said contract.

12 Am. Jur. 795, contracts, Section 252;

Bevans v. Muir (Wash.) 101 Pac. 485; 32 L.N.S. 588.

The same rule applies to the effect that in case of doubt or uncertainty in a contract, such doubt or uncertainty must be resolved in favor of promisee.

12 Am. Jur. 796, Contracts, Section 252.

There can be no doubt then that Paragraph 23 of Ex. D (R. 65) either expressly reserves to petitioner all his rights under this, his membership in Nylic No. 2 or in any event leaves the question in such doubt that the evidence concerning the statement of Mr. Elford made during the course of negotiations which lead up to the execution of said Ex. D are admissible to show that Ex. D did not in any manner affect petitioner's rights under Nylic No. 2, for at this stage of the case it must be assumed as a matter of law that the facts stated in the bill of particulars would be proven at the trial.

That a man can be so bound to a master with a reserved right in the master to discharge him without cause, after he has labored faithfully and exclusively throughout his active years in that employment, is

fitted for no other business, and still must refrain constantly from serving another master in the same, or any other business, unless he be given the right to work for that master, does violence to every concept of justice, and such is not the law.

It may be well to interject at this point the fact that the $354.89 monthly Senior Nylic payments to petitioner is not a graceful gratuity from the Company. Such sum is the amount that the Company's actuary has mathematically ascertained as being the total amount of the deferred renewal commissions withheld from the petitioner during his 20-year period and so withheld to bind him and thereafter distributed to him as a Senior Nylic in monthly payments during the period of his life expectancy. The respondent's use of such deferred renewal commissions during the 20-year period has proven profitable to the Company. So, no sympathy need be wasted upon the Company since it made money upon commissions withheld from the petitioner's own earnings.

Petitioner respectfully contends that the foregoing argument clearly demonstrates that since Petitioner cannot engage in other gainful pursuits to earn his livelihood, that he is in the same position as are other Senior Nylics, all of whom have the reciprocal and correlative right to demand from respondent employment as insurance sales agents during the existence of the Senior Nylic contract. Cancellation of the temporary agency contract does not relieve respondent of its duty to permit Senior Nylics to earn their regular compensation as Senior Nylic agents.

Point II.

Senior Nylic agents are entitled to employment by respondent during the existence of the Senior Nylic contract.

The District Court repeatedly reiterated its opinion that there is no language in the Senior Nylic contract which entitles such Senior Nylic to "life" or "permanent" employment by respondent (R. 148, 149, 150).

On the contrary, petitioner claims that no Senior Nylic can have any other business or occupation under the rule in Nylic No. 2 (Ex. F, R. 109) which provides "A Nylic" (which includes all Nylics of every degree including Senior Nylics, as no exception is made) "can have no other business or occupation for profit or gain" and further, that Senior Nylics "shall not enter the service of any other life insurance company" (Ex. F, R. 106) and by reason thereof respondent is duty bound to give petitioner employment and the right to earn his livelihood so long as petitioner remains a member of Nylic.

Senior Nylic agents under Nylic No. 2 are manifestly all Nylics, and as pointed out the rule is positive that no Nylic could enter any other business or occupation for profit or gain. If petitioner violated this rule, he was just as liable to have his Senior Nylic monthly compensation terminated as if he entered the service of another life insurance company. The result of these rules was that petitioner could not earn a living with any one else but respondent.

Respondent had received the full consideration from petitioner who had fulfilled the 20 years qualifying Nylic service. These 20 years were respondent's

beyond recall. Since the consideration was fully executed on petitioner's part, respondent is compelled to fulfill its part of the bargain. Moreover, petitioner submits that if he had violated these rules of Nylic No. 2 by entering another business or occupation for profit or gain or by entering the service of another life insurance company, respondent *could sue petitioner for damages for breach of contract.* After petitioner became a Senior Nylic we submit, that under the rules and regulations of the Nylic contract any gainful work, business or occupation on his part had to be for respondent only and no one else; that is, petitioner contracted to work for respondent exclusively so long as he remains a member of Nylic.

As previously indicated the issues in Petitioner's Third Cause of Action are unprecedented, and therefore this is a test case.

In this connection petitioner suggests that at any time prior to the expiration of the 20-year probationary period, the agent as well as the company could cancel the contract upon 30 days' notice. Thus, petitioner could have waived his reserved renewal commissions and, particularly, "could have entered into any other business or occupation for profit or gain" or he could have "entered the service of any other life insurance company. "The termination of an agent's contract and agency, *prior to his becoming a Senior Nylic,* or the removal or transfer of an agent, prior to becoming a Senior Nylic * * * terminates his Nylic membership and all his Nylic rights" (Ex. F, Par. XII (R. 111-112)). *But after petitioner became such*

Senior Nylic, he was irrevocably bound by such restrictive covenants.

Even if the petitioner had been willing after he was discharged by respondent to sacrifice his large lifetime monthly Senior Nylic of $354.89, and to sacrifice his Nylic Mortuary Benefits (deferred renewals) in excess of $8000 and to sacrifice other earned compensation by entering the service of another life insurance company in an attempt to earn his livelihood and his annual earnings in a sum of $28,500, he could not have done so because other life insurance companies would not employ petitioner as a result of respondent's wrongful act in

> "MALICIOUSLY DISSEMINATING FALSE AND DAMAGING INFORMATION REGARDING THE PLAINTIFF TO OTHER LIFE INSURANCE COMPANIES." (B/P, R. 126 (10))

Apropos, as brought out in the TNEC hearings referred to elsewhere in this brief, book part 10, pages 4633 to 4642, the New York Life Insurance Company was forced to disclose the secret operations of two bureaus, known as the Medical Insurance Bureau (MIB) and the Recording & Statistical Corporation (RSC), owned and conducted by the member companies which include respondent and practically all other life insurance companies of the United States and Canada. Every one who is conversant with the technique of said two bureaus, which use a code system to inform each company member about all phases of underwriting (which, of course, includes the soliciting agent) knows that it is next to impossible for a discharged agent of any member company to secure

life insurance employment, which is especially true if the agent has been discharged under a cloud as was the petitioner. The petitioner believes that his name is on the "Blacklist" of the MIB and the RSC (*supra*).

In sustaining a motion to dismiss on the grounds of no sufficient facts pleaded, plaintiff is entitled to have the facts pleaded together with all inferences therefrom construed most favorably to him.

McMillan v. Sims, 129 Wash. 516, 225 Pac. 240;

Klaskey & Mathson Co. v. Rothensies, 1 F R D 626.

In passing upon a motion for a directed verdict, court must give plaintiff the benefit of all evidence in his favor and every reasonable intendment therefrom.

Aitonen v. Morse, 136 Wash. 369, 240 Pac. 14;

A. B. Small & Co. v. Lamborn & Co., 267 U.S. 248, 69 L. ed. 597, 45 S. Ct. 300;

Swanson v. P. S. Electric Co., 118 Wash. 4, 202 Pac. 264.

Three Washington State Supreme Court cases sustain petitioner's contention, and since the United States Supreme Court gives credence to the interpretations of the State Supreme Court such cases should have greater weight than has been accorded them in the Circuit Court of Appeals in this case.

As the Supreme Court of the State of Washington said:

"The plaintiff claimed that this implied con-

tract was, that the defendant must provide a building in a proper state of forwardness, so that plaintiff's work could be installed within the time limited in its contracts with defendant * * * the rule is undoubted * * * that an implied contract arose on the part of defendant to keep the work on the building * * * in such a state of forwardness as would enable the plaintiff to complete its contract within the time limited." In *State v. Feigel*, 178 N.E. 435, a similar controversy arose over the breach of an implied obligation on the part of the State of Indiana to provide right of way for the road contractor during the performance of his work * * * the court said * * * it occurs to us that the plainest principles of justice require the implication of a covenant on the part of the State to provide a right of way so as to enable the Appellee (contractor) to prosecute his work to the utmost advantage and economy. Any other construction would destroy the mutuality of the agreement, and put in practically in the power of the State to defeat performance by the contractor. It is true that the contract does not expressly state that Appellant shall furnish the right of way, nor does it fix any definite time when the same should be acquired; but the clearest implication arises from the language of the agreement and its avowed object and interest that the right of way over which the proposed highway was to be constructed should be secured by the State. "* * * the principle above stated has been generally recognized and accepted by this court."

Byrne v. Bellingham Cons. School Dist., 7 Wn.(2d) 20 at 29-30.

"The remaining question is whether appellant

is equally bound by the contract set out above. It is evident that the consideration of appellee's assuming to carry said produce and incurring such liability was the implied promise of appellant to furnish it; and we believe the law will just as clearly and conclusively presume or imply such a promise on his part as if it had been set out in express words. To take any other view of the contract such as this would permit, in our judgment, a fraud and overreaching. There was a contract on one part to carry, and on the other a contract to pay so much a pound; and there was from this just as clearly a corresponding and correlative obligation to furnish for carrying. In Sedgwick's Leading Cases on Damages p. 382 is the case of *Black v. Woodrow*, 39 Md. 194, which seems to us decisive of this case, if the first objection herein made is not sufficient. It is there said 'If the act to be done by the party binding himself can only be done upon a corresponding act being done or allowed by the other party, an obligation by the latter to do or allow to be done the act or things necessary for the completion of the contract will be necessarily implied."

McCartney v. Glassford, 1 Wash. 579 at 581-582.

So far as petitioner can ascertain no interpretation of a similar insurance contract has been made by any Court. However, it would seem as if the doctrine of "*traditional notions of fair play and substantial justice*" as applied to each individual case during the past three years by the United States Supreme Court should be applicable to this case.

As examples, the United States Supreme Court

states that if certain beneficial results are received by one party, there is the implied correlative and reciprocal obligation to compensate the other party for such benefits. For instance, if a company has soliciting agents in a state there is the implied obligation to contribute to the State unemployment compensation fund.

International Shoe Co. v. State of Washington, 68 Sup. Ct. Rep. 154 at 158, 160.

The *International Shoe Co.* case, *supra*, cites with approval the following as legal authorities supporting its decision that, 'the traditional notions of fair play and substantial justice" must prevail in each case:

"The State which accords him privileges and affords protection to him and his property may also exact from him *reciprocal* duties"—in this case amendability to suit within the State even during sojourns without the State."

Milliken v. Meyer, 311 U.S. 457 at 463 (Headnotes 8-12).

"The State of New York has the power to regulate an Illinois insurance association which inures property located in New York, although the insurance contracts are signed in Illinois and losses are paid by checks mailed from Illinois.

Hoppeston Canning Company v. Thomas J. Cullen, Superintendent of Insurance et al., 318 U.S. 313, at 318.

"A citizen of the United States had removed his residence to France but had continued to owe allegiance to the United States * * *" "By virtue of the obligations of citizenship, the United States retained its authority over him" and "could penalize him by assessing a fine collect-

able from property in the United States owned by the citizen."

Blackmer v. United States, 284 U.S. 421, 436, 437.

"A citizen of New Jersey lent his automobile to a New Jersey friend for use for a day. The friend drove the car to New York and while driving there negligently struck a New York citizen. The New York statute provided that the owner of an automobile was liable for injuries to a person struck by the automobile. The owner was not in New York personally at the time of the accident and the friend was not his agent. Suit instituted in New Jersey by the injured person was upheld upon the ground that the car having been taken to New York with the owner's express or implied permission, the New York statute was enforceable."

Young v. Masci, 289 U.S. 253 at 255-256.

The foregoing doctrine of the *International Shoe Co.* case was reaffirmed in *Nippert v. Richmond*, Vol. 90 No. 9 Sup. Ct. (L. ed.) Advance Opinions 496 at 502, 505.

This court has very recently upheld the doctrine that an "implied" power may be enforced by the federal courts.

Porter v. Dicken, 66 S. Ct. 1094 at 1096.

Insurance business * * * is a business affected with *a vast public interest.*

Prudential Ins. Co. v. Benjamin, 66 S. Ct. 1141 at 1147.

A judgment ought not to be contrary to natural justice.

McDonald v. Mabee, 243 U.S. 90 at 91.

It should be noted that in each of such decisions where an obligation existed a correlative and reciprocal right could be implied therefrom. Such doctrine of "fair play and substantial justice" should be equally applicable in this case. If petitioner is still an agent of the Company, then the Company has the correlative and reciprocal duty to allow petitioner to earn his commissions of $28,580 per year, instead of being confined merely to receiving repayment of his reserved renewal commissions at the rate of $4,258 per year.

Other courts have likewise ruled that reciprocal obligations may be implied from the express language of the contract.

> "It very frequently happens that contracts on their face and by their express terms appear to be obligatory on one party only; but in such cases, if it be manifest that it was the intention of the parties, and the consideration upon which one party assumed an express obligation, that there should be a corresponding and correlative obligation on the other party, such corresponding and correlative obligation will be implied—as, if the act to be done by the party binding himself can only be done upon a corresponding act being done or allowed by the other party, an obligation by the latter to do or allow to be done the act or thing necessary for the completion of the contract will be necessarily implied."
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> *S. W. Light Co. v. City of Joplin*, 101 Fed. 23 at 28;
>
> *In re Silverman*, 101 Fed. 219 at 220;
>
> *William v. DeSoto Oil Co.*, 213 Fed. 194 at 198.

"Wherever one party to a contract enters upon the performance of an express obligation imposed upon him by a contract, the law implies a corresponding obligation on the part of the other party to the contract which reasonable men would understand must have been intended to be included."

Rifkin v. Safenotz, 40 Atl.(2d) 188 at 190.

"Although the contract did not expressly require the city to offer the garbage in the condition contracted for, the law will imply a covenant that the city will perform a correlative duty * * * and cannot by its own act prevent the contractor from performing the contract according to its terms * * * where a contract obliges one party to perform it, and its performance, within the intention of the parties, requires the performance of a correlative obligation by the other party, such obligation will be implied."

Atlantic City v. Farmers Supply & Products Co., 115 Atl. 388 at 389.

"This contract provides for the sale by defendant to plaintiff of a certain quantity of feed. Though the contract does not, in explicit words, recite that plaintiff agrees to purchase and pay for the same, this is clearly implied by the acceptance of the contract by the plaintiff through the signing of his name thereto."

Heffernan v. Newmond, 201 S.W. 645 at 646.

Lewis v. Atlas (61 Mo. 354), herein referred to, was an action brought for a breach of contract of agency. The court said:

"It is true, there was no positive and direct

covenant on the part of the company to carry on the business for any definite time. But the plaintiff agreed to act exclusively for the company for the term of five years, and had he neglected or failed, he would have been liable in damages. If he was bound for that length of time, it necessarily follows that the company must also have been bound; for mutuality was essential to the validity of the agreement. It very frequently happens that contracts on their face and by their express terms appear to be obligatory on one party only; but in such cases, if it be manifest that it was the intention of the parties, and the consideration upon which one party assumed an express obligation, that there should be a correlative and corresponding obligation upon the other party, such corresponding and correlative obligation will be implied. As, if the act to be done by the party binding himself can only be done upon a corresponding act being done or allowed by the other party, an obligation by the latter to do or allow to be done the act or thing necessary for the completion of the contract, will be necessarily implied, When plaintiff bound himself to give his exclusive services to defendant for the period of five years, there was a correlative and corresponding obligation upon the part of defendant, to give him employment and allow him to pursue and execute the terms of the contract. This was manifestly the intention of the parties."

See also the same effect:

Glover v. Henderson, 120 Mo. 367; 41 Amer. St. Repts. 695.

Wilcox & Gibbs Sewing Machine Co. v. Ewing, 141 U. S. 627; 35 L. Ed. 882.

MacGregor v. Union Life Ins. Co. of Omaha, 121 Fed. 493.

Mechem on Agency, Sec. 600.

"It is said that this contract is void for want of mutuality; but we do not think so. Appellee paid a fixed sum of money and agreed to give appellant employment for a definite time * * * In consideration of this appellee agreed to purchase from appellant the supplies * * * and, whether that amount was much or little, included all the supplies so purchased. This agreement necessarily implied that the goods should be sold at the usual and customary prices; just as such an agreement is implied in any case where goods are purchased without any definite understanding as to price."

Wilkes v. Stacy, 169 S.W. 796 at 798.

"It frequently happens that the full scope and purpose of an agreement cannot be accurately ascertained without considering the subject matter to which it relates and the circumstances under which it was executed. When a case of that kind occurs, and the necessity arises for going outside of the language employed, for the purpose of ascertaining its meaning or the probable intention of the parties thereto, a court is always privileged to do so, and may properly consider any fact or circumstances which sheds light on the transaction. The case at bar is one which, in our judgment, demands a liberal application of this doctrine. While the parties to the contract have failed to state how long it should continue in force, they have nevertheless manifested an intention to enter into a business arrangement with each other which should last for some years and until a certain expected event had occurred.

We think, therefore, that the happenings of that event should be held to limit the duration of the contract, and that until such time the logging company remains bound by its provisions."

Mississippi River L. Co. v. Robson, 69 Fed. 773 at 778-781.

"If there be ambiguities in the contract they are to be resolved against the defendant who undertook to embody into writing the agreement which the parties had made * * * Where a written contract has an apparent meaning at variance with its real meaning, it may bind the author of the ambiguity contrary to its real meaning, if this meaning was so obscurely expressed that the other party was likely to be misled and was misled."

Aldrich v. N. Y. Life Ins. Co., 139 N.E. 245 at 248.

"A contract to sell and deliver to another all that one party may require in an established business or *all the product that the other party may produce for a definite period* from a certain mill or plant does impose such a fixed obligation as to save the mutual character of the promise. In such cases the quantity sold can be made to reasonably appear and is capable of an approximately accurate estimate. And so a contract for the sale of the entire output of a mill of known capacity for a definite period would be binding although the amount so sold is not definitely ascertained. * * * Where a party originally not bound had executed the contract, the doctrine relative to mutuality does not apply."

El Dorado I. & P. M. Co. v. Kinard, 131 S.W. 460 at 462.

"The obligation of the defendant, expressed in the contract, to purchase the lumber, implied a corresponding obligation on the part of the plaintiff to sell and deliver it at the prices named, and on the stipulated terms, and the language of the contract shows an agreement on their part to sell and deliver the lumber to defendant." * * * "The contract does not present a case where the obligations are all on one side and none on the other." * * * "The case of *Minneapolis Mill Co. v. Goodnow* (42 N.W. 356) is very much in point. The court, in construing a provision (of the contract) said 'There is in this agreement no express promise on the part of Goodnow to furnish, for plaintiff to saw, the 6,000,000 feet of logs which the plaintiff is to saw for him and as he shall direct.' But that is necessarily implied. How could it saw the logs as he shall direct, unless he should furnish them? There can be little doubt that, as the parties understood this agreement when they executed it, Goodnow was thereby engaging to furnish the 6,000,000 feet of logs for plaintiff to saw, and plaintiff was engaging to saw them in the manner and at the prices specified. A third party would so understand it."

Moore v. Sharp, 125 S.W. 659, at 660-661.

See also:

Chi. R. I. & G. Ry. Co. v. Martin, 163 S.W. 313 at 314.

"Although a contract on its face appears to be obligatory on one party only, yet, if it was the manifest intention of the parties that there should be a correlative obligation on the other party, the law will imply such obligation." * * * "The implied part of the agreement is as certain

and definite as if it had been stated in so many words."

Glover v. Henderson, 120 Mo. 367 (41 Am. St. Rep. 695 at 701).

"By their 6th cross-assignment of error the defendants below present to this Court the proposition that the contract sued upon contains no promise of either of the defendants to do any act for Ben C. Jones & Co., therefore, there could be no breach where there was no promise. If this were a correct construction of the instrument, it would necessarily defeat this action, but the law implies a contract on part of the Gammel Book Company, for whom the contract was made to furnish the manuscript of the Reports * * * the failure to perform that implied agreement constituted a cause of action just the same as if the agreement had been written into the face of the contract itself."

Jones v. Gammel-Statesman Pub. Co., 8 L. R.A. (N.S.) 1197 at 1203 (n.2).

"The railroad company agreed to put in a switch at the place designated. * * * Out of the terms of this contract there arose, by implication, an obligation on the part of the ralroad company to maintain that switch in reasonably good condition for use."

Missouri K. & T. Co. v. Carter, 68 S.W. 159 at 169.

"It not infrequently occurs that contracts on their face and by their express terms appear to be obligatory upon one party only; but in such cases, if it be manifest that it was the intention of the parties, and the consideration upon which one party assumed an express obligation, that there should be a corresponding and correlative

obligation on the other party, such corresponding and correlative obligation will be implied. Among the instances given of such implied obligation is the case where A covenants or contracts with B to buy an estate of the latter at a given price. There, although the contract may be silent as to any obligation on the part of B to sell, the law implies a corresponding covenant or contract by him to sell and convey the estate."

Ferguson v. Getzendaner, 83 S.W. 374 at 376.

"The obligatory promise to have the company's outfit on the ground ready for work in two weeks after notice, and to complete the work within a given time thereafter, carried with it the implied agreement of the other party to be ready for the working outfit when it came after such notification. This mutuality of obligation carried with it accountability on the part of plaintiff in error for the loss of time necessarily occasioned by the detention of the workmen from entering upon the construction work."

Hinds v. Hinchman-Renton Fireproofing Co., 165 Fed. 339 at 341.

"If the act to be done by the party binding himself can only be done upon a corresponding act being done or *allowed* by the other party, an obligation by the latter to do or *allow to be done* the act of things necessary for the completion of the contract will be implied."

Jordan v. Indianapolis Water Co., 64 N.E. 680, 683.

(The railroad) "accepted this title with all the benefits annexed and appurtenant, and surely fairness and equity will make it perform the obligations annexed and appurtenant thereto."

Mo. K. & T. Ry. Co. of Texas v. State, 275 S.W. 673 at 679.

"Through a writing executed by partners merely recited the dissolution of the firm, the sale of one partner's interest to the other * * * but did not recite any obligation of the other partner * * * yet the other partner will be deemed to have impliedly promised to be bound by the adjustment of all matter referred to in the writing. * * *"

Dille v. Parker, 90 N.E. 520.

The following decisions of the United States Supreme Court, use language applicable to the facts in this case.

"THE DECISIONS OF THIS COURT LEAVES NO DOUBT THAT A MAN'S TIME MAY, AS A MATTER OF LAW, BE IN THE SERVICE OF ANOTHER THOUGH HE BE INACTIVE * * * THE EMPLOYER IS LIABLE * * * BECAUSE UNDER THE CIRCUMSTANCES, THOUGH HE HAD ILLEGALLY DISCHARGED THE EMPLOYEE, HE STILL ABSORBS HIS TIME. IN SHORT, AN EMPLOYER MUST PAY WAGES ALTHOUGH, IN VIOLATION OF LAW, HE HAD SUBJECTED HIS EMPLOYEE TO ENFORCED IDLENESS." (MR. JUSTICE FRANKFURTER)

Social Security Board v. Nierotko, Vol. 90—No. 9 U.S. Sup. Ct. (L. ed.) Adv. Opin. 594 at 602.

"The underlying rationale of the law against unreasonable restraints is two-fold. The first of these reasons is that the law will not lend its aid in enforcement of a contract by means of

which a man may deprive himself of the possibility of earning a livelihood and deprive the public of the benefit of his labor." The second, "that such restraints tended to give * * * the beneficiary of such restraints, a monopoly of the trade from which he had thus excluded one competitor and by the same means might exclude others."

> *Scott Paper Co. v. Marcalus Mfg. Co.* (U.S. Supreme Ct.) Vol. 90, No. 2 Sup. Ct. (L. ed.) Adv. Opin. 88 at 92 n.2.

"To be sure, Congress had not said in so many words that the seller of a patent * * * is subject * * * to the obligations of fair dealing." * * * Until this day such a sophistical argument to accomplish overreaching in a business transaction had uniformly been rejected by the courts, and it has been rejected by this Court on basic considerations of "fair dealing." (9A) * * * "the principle of fair dealing" * * * "has been a part of the fabric of our law throughout the life of this nation." (94) * * * "the isolated, individual relation between assignor and assignee, due to the sale by the assignor of something which he afterwards should not be allowed to say was nothing, is the basis of the doctrine of fair dealing which operates against him and against nobody else." (95) * * * "what is there in reason * * * that should preclude enforcement of a fair bargain whereby an individual agreed, in effect, not to compete with another * * *" (95) * * * "Happily law is not so divorced from ethical standards that a hitherto unquestioned principle of fair dealing should be deemed hostile to any branch of the law." (96) * * *

Scott Paper Co. v. Marcalus Mfg. Co. (Vol. 90—No. 2 Sup. Ct. (L. ed.) Adv. Opin. 88 at 94-96.

Mr. Justice Frankfurther, dissenting in the foregoing cases, states:

"When by a fair and free bargain a man sells something to another, it hardly lies in his mouth to say 'I have sold you nothing.' It certainly offends the rudimentary sense of justice for courts to support one who purports to sell something to another in saying 'What I have sold you is worthless,' even though he did not expressly promise that what he sold had worth. The obvious implications of fair dealing in commercial transactions have been part of our law for at least a hundred years."

Scott Paper Co. v. Marcalus Mfg. Co. (U.S. Supreme Ct. Nov. 13, 1945) Vol. 90—No. 2 Supreme Ct. (L. ed.) Adv. Opin. 88 at 93.

"Determination of the issue of the right of Congress to regulate holding companies and to provide a plan for the reorganizaztion of such company, 'must meet the standards of fairness and equitableness'."

North Am. Co. v. Sec. & E. Com. (Apr. 1, 1946) Vol. 90—No. 12 U.S. Sup. Ct. (L. ed.) Adv. Opin. p. 737 at 749.

"This case does not turn on technical agency rules such as apply in the simple, individualistic situation where P deals with T through A about the sale of Blackacre. We are here dealing with problems in a specialized field, with a long background of custom and practice in the railroad world * * * custom and usage may be as adequate

a basis of authority as a more formal authorization of the union * * * (Headnote 1, 707).

Elgin, Joliet & Eastern R. Co. v. Burley (March 25, 1946) Vol. 90—No. 11, U.S. Cup. Ct. (L. ed.) Adv. Opin. p. 706 at 707.

That appellant is entitled to his right to earn his regular yearly stipend, or be awarded damages in lieu thereof, is upheld in the following decisions upon analagous facts:

"The plaintiff sought to establish his damage by comparing his profits before and after the unlawful interference with his business * * *(585) * * * The jury may make a just and reasonable estimate of the damage based upon relevant data, and render its verdict accordingly. In such circumstances 'juries are allowed to act on probable and inferential as well as upon direct and positive proof. * * * The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created * * * the wrongdoer may not object to the plaintiff's reasonable estimates of the cause of injury and of its amount. (p. 585) * * * The constant tendency of the courts is to find some way in which damages can be awarded where a wrong had been done. Difficulty of ascertainment is no longer confused with right of recovery for a proven invasion of plaintiff's rights. * * * The comparison of petitioners' receipts before and after respondent's unlawful action impinged on petitioners' business afforded a sufficient basis for the jury's computation of the damage, where the defendant's wrongful action had prevented petitioners

from making any more precise proof of the amount of the damage."

Bigelow v. RKO Radio Pictures, Vol. 90—No. 9 (U.S. Sup. Ct.) (L. ed.) Adv. Opinions 579 at 585, 586.

"If the agency * * * was wrongfully terminated plaintiff's remedy would be for breach of contract in which the probable value of his interest in future premiums would be an element of his damage."

Hart v. Lincoln Nat. Life Ins. Co., 174 N. W. 740 at 741.

"In an action by an insurance agent against an insurance company for wrongful dismissal from its service he may recover the value of probable renewal of policies actually obtained by him."

Aetna Life Ins. Co. v. Nexsen, 84 Ind. 347 (43 Am. Rep. 91 at 92-94).

"I know of no way of judging the future except by the past." Judgments thus formed are not always accurate, but they are sufficiently so as to control the actions of reasonable men in the most important affairs of life; and we think this standard is sufficiently accurate to have enabled the jury in this case to estimate the amount of proffits which Griswold would have received under his contract had he been permitted to carry it out." * * * The insurance company breached its contract with Griswold, by reason of which it became liable to him for all such damages as reasonably resulted from such breach."

Merchants Life Insurance Co. v. Griswold, 212 S.W. 807 at 813.

The undeniable fact in this case is that petitioner

has been discharged by respondent admittedly WITHOUT CAUSE and for no understandable reason. Respondent practically admitted in its brief to the Circuit Court of Appeals (p. 150) that this is one of the cases which respondent does not dare to submit to a jury of petitioner's peers.

Courts should not be an instrumentality to promote a wrongful result whether of a physical, moral, or economic nature. The court has power to make a direct assault upon an economic evil which materially affects the labor relation of many employers with their employees.

> "New situations call for new adaptation of judicial remedies."
>
> *Radio Station WOW v. Johnson*, 326 U.S. 120 at 132.

> "The purpose of all interpretation is to ascertain and give effect to the intention of the parties to the contract as expressed in their writing, and in doing this it is necessary to consider the circumstances surrounding the making of the contract, its subject, the situation and relation of the parties and the cause in which, taking these things into consideration, the words used would be commonly understood; for it fairly may be assumed that the parties used and understood them in that sense."
>
> *ALf Bennett Lumber Co. v. Walnut Lake Cypress Co.*, 151 S.W. 275 at 277.

Petitioner submits that he bought and paid for employment with respondent at least for so long as petitioner remains a member of Nylic by furnishing to respondent several different considerations other

than the services to be performed by petitioner, the most important of which was giving up at the specific request of respondent his bank position and bank career for a life career with respondent, under certain oral provisos stipulated by respondent, said provisos being if Nylic should be reinstated and petitioner should stay with respondent for 20 years and qualify as a Senior Nylic, all of which was admittedly done by petitioner (R. 124d).

There is a long list of important cases on the question of "Consideration other than the services to be performed," (which we will omit for the sake of brevity). However we cite one important case which is four square in point, to-wit:

Reifkin v. E. I. Dupont DeNemours & Co.,
290 Fed. 286, 53 App. D. C. 311.

Considerations furnished by petitioner to respondent other than petitioner giving up his bank career at respondent's request are:

1. "A Nylic can have no other business or occupation for profit or gain" (Gen. Rule No. 1 (R. 109), which restrictive measure of course deprived the petitioner from making substantial sums of money outside of life insurance.

2. "Senior Nylics shall receive so long as they live, provided only that they shall not enter the service of any other life insurance company, monthly payments as follows (R. 106)": which prohibited petitioner from competing with the respondent, thereby causing the petitioner to lose substantial sums.

3. Petitioner entered into Nylic at request of re-

spondent (R. 124) and continued thereunder for 28 years. "Continuous service does constitute consideration on the theory that appellee at its (employer's) request benefited thereby" *Goldberg v. John Hancock Mutual Life Ins. Co.* (N.J., 1938) 1 Atl.(2d) 483.

The case at bar is fraught with a "Public Interest" because the respondent by a combination of restrictive Nylic covenants in Nylic contract, "F" and a wrongful act committed against the petitioner, were intended to have the effect and have had the effect of preventing other life insurance companies from employing a citizen, the petitioner, thereby depriving a citizen, the petitioner, from his legal right to earn his livelihood.

The said wrongful act which respondent committed against petitioner was:

> "Maliciously disseminating false and damaging information regarding the plaintiff to other life insurance companies." (Bill of Particulars, R. 126, (10).)

The restrictive covenants in petitioner's Nylic contract "F" are as follows:

(1) "A Nylic (which means all Nylics because no distinction is made) can have no other business or occupation for profit or gain." (R.109)

(2) "Senior Nylics shall receive as long as they live, provided only that they shall not enter the service of any other life insurance company, monthly payments as follows." (R. 106)

No corporation by a combination of contractual restrictive covenants like those employed by respon-

dent in its Nylic contract, can combine them with wrongful acts to prevent a citizen from earning his livelihood, and that is just what respondent has done to petitioner, which obviously is against public policy.

A contract of service which contains express or implied stipulations as to the duration of the employment, is not a contract of general hiring terminable at will, but is a contract compelling its continuance during the express or implied period.

We submit that the Nylic contract, (R. 493) which makes Nylic No. 2; ("F," R. 91-112) a part thereof contains an express or implied stipulation that the duration of petitioner's employment shall last so long as petitioner remains a member of Nylic. This is a fixed period of employment. It may be for life and it may not be, but this does not alter the fact that it is a fixed period of employment.

All the leading cases hold, that unless a contract contains either an express or implied period of employment, or good consideration other than the services to be rendered under the contract, it is nothing but a general hiring, terminable at will, but we submit that petitioner's Nylic contract does contain an express and implied period for employment, to-wit: "So long as I remain a member of Nylic" and that in connection with said Nylic contract, as pointed out elsewhere in this brief, the petitioner furnished respondent several good considerations other than the service to be performed. Therefore petitioner's Nylic contract is

definitely removed from the realm of being a general hiring, terminable at will. This Court is conversant with the long list of cases establishing such fundamental legal principles.

Petitioner respectfull submits that the foregoing authorities demonstrate that so long as the Senior Nylic relationship exists whereby petitioner cannot be gainfully employed elsewhere, then the legal doctrine of 'fair play and substantial justice' should be made applicable and petitioner be paid by respondent the damages which were caused by respondent's failure to carry out its reciprocal, correlative and corresponding obligation of retaining petitioner in his regular agency employment.

Point III.

Petitioner never exchanged his Senior Nylic agency right of employment for a terminable agency at a higher compensation.

The District Court, in its memorandum opinion (R. 151-152) dismissing plaintiff's Third Cause of Action, in two separate paragraphs, used language from which any reasonable person would infer that petitioner by virtue of attaining the Senior Nylic status had acquired a life-agency but that the petitioner had the right to barter it away and did barter it away by entering into agreement "D," (R. 50-65) "with its higher schedule of compensation."

In as much as the court did not make any explanation as to what he meant by "Schedule of Higher

Compensation," the first obvious question that his conclusion suggests is, *a higher schedule of compensation over what compensation?*

In the first place the question of "Compensation" in Ex. "D" (R. 50-65) has not the slightest bearing on voiding petitioner's Senior Nylic agency. If, as the Court stated or implicated, that petitioner had a life-agency as a Senior Nylic, the petitioner still retains same, because agreement "D," in section 23 (R. 65) specifically provides that "D" "cannot alter or effect anything that was vested in petitioner's Nylic membership." The question now is what does petitioner's Nylic membership embrace? Petitioner respectfully submits that it inherently embraces employment for so long as appellant remains a Senior Nylic.

The plain facts, as shown hereinafter, clearly establishes that agreement "D," *not only did not provide for any higher schedule of compensation than petitioner had priorily earned or received but that "D" did not contemplate any higher compensation.*

All life insurance companies, if they were so minded, could pay their soliciting agents a yearly renewal of 5% during the life of each policy because every premium is fully loaded and moreso for this purpose. Therefore, every full-time agent of respondent whether the agent be a Qualifying Nylic agent, or a Senior Nylic agent or a non-Nylic agent is always entitled to receive the minimum traditional 9 renewals of 5% each, (45%), or the equivalent of 45%. Whether a Qualifying Nylic agent receives his renewals of 45%, divided

30% in Nylic payments, (Nylic being the name for deferred renewal) and direct renewal of 15%, or whether a Senior Nylic receives his 45% in the form of 9 direct renewals of 5% each, makes no difference. Never did truer exception prove the rule. The petitioner under agreement "B," as a non-Nylic agent, had the traditional 9 renewals of 5% each, (45%).

When the respondent inveigled petitioner to allow respondent to substitute respondent's DUAL AGENCY, comprising Nylic, (F) and agreement "C" for petitioner's agreement "B" the respondent represented to petitioner that his compensation during the qualifying Nylic period would be equal to or exceeded by the combined compensation under "F" and "C," made up, 30% under "F" and 15% under "C."

The respondent at the same time further represented to petitioner that when he became a Senior Nylic and thereafter would not be allowed to earn the Nylic 30% compensation, the respondent then would give petitioner a Senior Nylic agency agreement providing for the traditional nine renewals of 5% each, (45%), the same compensation that petitioner had in his surrendered agreement "B," which representation the respondent fulfilled.

If, as represented by respondent to petitioner that its Nylic compensation of 30% combined with one renewal of 15% will equal or exceed the traditional 9 renewals of 5% each, (45%), then it must follow by the respondent's own statement, that agreement "D," with its 9 renewals of 5% each, did not pay petitioner as much compensation, (certainly not more)

than petitioner earned or received under either "B" or "F" and "C," thus rendering nugatory the dis-district court's erroneous conclusion that "D" provided for a "Higher Schedule of Compensation" and by reason thereof, petitioner bartered away his life-agency.

"B"	equalled	45%
"F" & "C" together	equalled	45%
"D"	equalled	45%

Thus, according to "B" and "D" and the combination of "F" and "C," and the respondent's representation relative to the compensation under "F" and "C," the compensation under all three sets of contracts was the same, to-wit: 45%.

It has long been a mooted question between respondent and its competitors and has been bitterly argued between them as to whether respondents Dual Agency, paying 15% in renewals and the balance under several different Nylic formulae, equals or exceeds the traditional 9 renewals of 5% each, (45%) paid by respondent's competitors.

In so far as the petitioner knows neither the respondent nor any other life insurance company has ever reduced to writing to prove whether the traditional 9 renewals of 5% each, (45%) will pay an agent less, the same, or more compensation than respondent's Dual Agency of Nylic and one renewal of 15%. However, the petitioner knows, as many thousands of other agents know, among the ranks of the respondent and its competitors, that the respondent represents to prospective new agents, as it did

to petitioner, that its Nylic compensation plus 15% in renewals is as good or better than the traditional 9 renewals of 5% each (45%); contrariwise that all companies who pay the traditional 9 renewals of 5% each represent that such compensation (45%) is as good or better than the respondent's said dual agency of Nylic and one renewal of 15%.

The only way that the District Court could correctly conclude that "D" contained a "Higher Compensation" than that which petitioner had in his prior contracts, 'B," and "F" and "C" was to have the respondent furnish the court a detailed accounting which we submit, the court did not ask for, nor was it volunteered by the respondent. Even had it been requested by the court, its revelation would have been immaterial, because, as previously stated, agreement "D," in section 23d, expressly provides that "D" cannot alter or effect petitioners Nylic membership, in which membership employment is inherent for so long as petitioner remains a Senior Nylic.

Paradoxical as it may seem, but nevertheless a fact, the respondent will pay any new agent who comes off the street and works for the respondent for the first time, the same 45% in renewal commissions that respondent gave the petitioner as a Senior Nylic in 'D," and that in the face of the significant facts that petitioner had rendered to respondent 20 years of continuous and faithful service, during which time the petitioner made the respondent a big profit and in many other important respects protected and advanced the company's interests. While the petitioner,

as a Senior Nylic, was entitled to more compensation under "D," the fact still remains that he did not receive any higher compensation of any sort under "D."

It is an undeniable fact that during the fifteen years prior to the cancellation of his contract, petitioner had been earning an average compensation of $28,500 per year under his Senior Nylic agency agreement relationship. It is unimaginable that petitioner would be content to accept merely $4,258.68 per year—the amount of the deferred renewal payments earned during the 20 year probationery period —in exchange for $28,500 per year. For eight years during his Senior Nylic activities, petitioner had been paid such average stipends in the larger amount and respondent had acquiesced in petitioner's understanding that he would be an active agent of the company during the continued existence of petitioner's Senior Nylic contract, earning such larger amounts. Respondent should now be estopped from claiming that such larger compensation be denied petitioner.

Petitioner submits that one of the objectives of "Nylic" was to make the relation fiduciary between respondent and its Nylic agents, especially as between it and its Senior Nylics.

If "Nylic" created a fiduciary relation between respondent and petitioner and petitioner has never ceased to be a Nylic agent, the said fiduciary relation still exists.

Respondent in its book, "Studies in Practical Life Insurance" (Bill of particulars, (R. 123, (2) states, "It (Nylic) made the interest of the company the interest of the agent." That is manifest, because in order for a Nylic agent to be successful and fulfill the terms of his Nylic contract he at all times must advise his clients as much in the interest of the respondent as well as in his own behalf. These things constitute a fiduciary relation. The fact that the respondent operates under the branch office system and not under the traditional general agency system and makes all of its contracts direct with its agents is added proof that a fiduciary relationship was contemplated.

Petitioner's agreement "B" was a highly valuable unrestricted agency contract, rarely, if ever, made more liberal by respondent or any other life insurance company, whereas, the combination of "F" and "C" was highly restrictive and of speculative value as compared with "B." The petitioner reposed tremendous confidence in respondent when petitioner allowed respondent to substitute "F" and "C" for "B." Here is demonstrated the highest standard of a fiduciary relationship.

When a fiduciary relation exists it is not necessary under the law to allege fraud, undue influence, coercion or over-reaching which accounts for the fact that petitioner did not allege any of these things in his complaint or bill of particulars.

Mr. L. Seton Lindsay, while agency director of respondent's Seattle Branch Office, made the following

representation to petitioner which induced petitioner to give up his bank position and to enter Nylic contractual relations with respondent.

> "That L. Seton Lindsay, Agency Director of the Seattle Branch Office, represented in January, 1908, to plaintiff that if plaintiff would give up his position with the Dexter Horton National Bank of Seattle and become a full-time agent of the New York Life Insurance Company, and that if Nylic should be reinstated and plaintiff would stay with the defendant for twenty years he would thereafter have a guaranteed monthly life income and employment for life." (R. 142-(5))

Mr. A. S. Elford, made the following representation to petitioner in 1928 which induced petitioner not to retire under his Senior Nylic income but to continue for life in the service of respondent.

> "A. S. Elford, in the capacity of Inspector of Agencies of defendant's Western Department in Seattle about August 1, 1928, represented to plaintiff that agency agreement, plaintiff's Exhibit 'D,' was simply a commission contract and that Section 20 of the agency agreement (plaintiff's Exhibit 'D') did not apply to plaintiff as a Senior Nylic." (R. 124-125)

Petitioner believes that both Mr. Lindsay and Mr. Elford made their said representations and interpretations of the Nylic contract in good faith and in accordance with their honest opinions; however, if they did not, then they both purposely deceived and defrauded petitioner. In this connection it is pertinent, and should be noted here that both Mr. Lindsay

and Mr. Elford had self-interest in making said representations and interpretations to petitioner because both of them had contracts with the respondent company which paid them a bonus or overwriting commission on all cases that petitioner wrote for respondent through their respective offices.

The final report and recommendations, Document 35, of the Temporary National Economic Committee, dated March 31, 1941, pages 42-3, contains the following recommendation to State legislatures:

> "The statute should also declare life insurance officials not only in fact, but in the eyes of the law, trustees *required to adhere to the strictest fiduciary standards*, and appropriate civil and criminal penalties should be demanded."

The respondent in Nylic No. 2, sets forth several extended illustrations to show what a qualifying Nylic agent will earn and what his monthly lifetime Senior Nylic commissions will be on the basis of an assumed amount of production, which assumed production, we submit, is greater than that produced by the average qualifying Nylic Agent. According to these attractive figures of the respondent's own choosing the final illustration shows such a Nylic will earn a monthly Senior Nylic of $71.10. Petitioner believes that the average Senior Nylic income is less than $71.10 a month. The Senior Nylic of petitioner is $354.89 a month, which is five times greater than $71.10 a month, thereby making it a mathematical fact that the petitioner during his 20 year qualifying Nylic period produced at least five times more business

and made respondent five times more profit than respondent's average Senior Nylic. This exceptional Nylic record which petitioner made creates a strong presumption that respondent used it as a means to and did thereby secure many Nylic agents with its large attending profits. The dates of petitioner's contracts, Oct. 7, 1907, and Jan. 1, 1908, and "F" and "C" effective as Jan. 1, 1911, establish that the petitioner went to the rescue of respondent when the respondent was in serious troubles as a result of the Armstrong investigation in 1905-06 and the Panic of 1907. The letter written by Mr. Whitney to petitioner, on Jan. 5, 1928 (R. 135), portrays accurately the then status of petitioner, which status we submit, was no different 8 years later when respondent made this contemplible attack upon petitioner and we urge that it be read by the court. In this same connection we suggest that the court read Mr. Buckner's letter (R. 136) to petitioner. Both of these letters create a strong presumption that petitioner, as a Senior Nylic was entitled to employment so long as he remains a Senior Nylic.

Happily in this case, the courts can take judicial notice of government records.

> As the Ninth Circuit of Appeals has rightly held "the courts can consider the legislative history of corporate activities *and the hearings before Congressional Committees* can be gone into to review such activities."
>
> *Bowles v. Wheeler*, 152 F.(2d) 34 at 38 (Bone, Circuit Judge, Oct. 1, 1945).

On February 6, 1939, Hon. William O. Douglas, while Chairman of the Securities and Exchange Commission, said the following to the TEMPORARY NATIONAL ECONOMIC COMMITTEE CONGRESS OF THE UNITED STATES (TNEC) which was appointed by the Federal Government to investigate the concentration of economic power in the New York Life Insurance Company (and other large corporations) (Book 4, page 1162-3 (TNEC hearings)).

> "The last comprehensive analysis of the life-insurance business by an agency of the Government was the study made by the so-called Armstrong Committee, of which Charles Evans Hughes, now Chief Justice of the United States, was counsel. I earnestly recommend to each member of this committee a careful reading of the Armstrong report.
>
> "Through the device of proxies and otherwise, the then officials of such companies were found to occupy, as the Armstrong report put it, 'UNASSAILABLE POSITIONS,' and to exercise "DESPOTIC POWERS,' over the companies. Only an insignificant number of policyholders exercised their right to vote, and the Armstrong Committee stated that *the most fertile source of abuses in life insurance administration had been the sense of irresponsibility of the officials then in power.* That was in 1906. Since 1906 there has been a tremendous and spectacular growth of insurance."

The officers of respondent who wrongfully discharged petitioner and the officers who have kept petitioner from being reinstated have injured respondent's policyholders in many ways, thereby prov-

ing their further "Sense of Irresponsibility" as reported by the Armstrong Committee.

The officers of respondent company, without the slightest legal reason, have (1) subjected its policyholders to the large expenses incident to this unprecedented litigation; (2) have deprived the policyholders of the big profit on petitioner's customarily large and preferential class of risks; (3) have deprived the policyholders of petitioner's inspirational leadership which translated into money has meant a big loss; (4) have deprived respondent's other Nylic agents the loss of the canvassing value of petitioner's customary select list of clients which translated into money has meant a big loss; (5) has undermined the security which every Nylic thought that he had under his Nylic contract; (6) has caused a number of otherwise loyal and boosting policyholders to lose faith in respondent because they feel that respondent has wrongfully discharged and persecuted petitioner; (7) has furnished respondent's powerful competitors with good arguments why prospective agents should not become Nylics. Not to mention cluttering up the courts with unnecessary litigation and expenses incurred therewith.

We submit that the reprehensible conduct of respondent in wrongfully discharging petitioner without cause, wrongfully causing him to be blacklisted, and wrongfully causing him to be unable to earn his livelihood, and for further reasons just cited, show as much, or a greater "Sense of Irresponsibility" and "Abuse of economic power" than anything that was unearthed against the New York Life Insurance Com-

pany by either the "Armstrong Committee" or the "Temporary National Economic Committee."

The foregoing being true, the motion to dismiss should have been overruled by the trial court. Petitioner respectfully submits that the contracting documents, together with all the facts and circumstances alleged in the complaint, bill of particulars and the accompanying exhibits, present a question of fact for the jury's determination as to whether a contract of service co-extensive with petitioner's membership in Nylic existed, and if the jury so find, whether the respondent breached the same and the amount of damage resulting from any breach thereof by respondent.

PRAYER

It is therefore respectfully submitted that this case is one calling for the exercise by this Honorable Court of its supervisory powers, by granting a Writ of Certiorari and thereafter reviewing and reversing said decision of the United States Circuit Court of Appeals for the Ninth Circuit.

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CERTIFICATE

The undersigned as counsel for Petitioner in the foregoing Petition for Writ of Certiorari, hereby certifies that said Petition is well founded and not interposed for delay.

Daniel B. Trefethen

Attorney for Petitioner.

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No. 339

In the Supreme Court of the United States

OCTOBER TERM, 1946

F. C. MOSER, *Petitioner*,

vs.

NEW YORK LIFE INSURANCE COMPANY, a corporation, *Respondent*.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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In the

Supreme Court of the United States

OCTOBER TERM, 1946

F. C. MOSER,
Petitioner,

vs.

NEW YORK LIFE INSURANCE COMPANY, a corporation,
Respondent.

No. 339

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

Neither of the opinions below has as yet appeared in the printed reports. The opinion of the District Court dismissing the Amended Third Cause of Action, here sought to be reviewed, is set forth in the Appendix, *infra*, pp. 9-15. The Circuit Court of Appeals accepted the opinion of the District Court and, for the reasons therein set forth, affirmed its judgment (R. 1198).

JURISDICTION

This cause was begun in the Superior Court of the State of Washington for King County (R. 2) and re-

moved to the United States District Court for the Western District of Washington, Northern Division, solely by reason of diversity of citizenship (R. 14-19), The judgment of the Circuit Court of Appeals affirming the judgment of dismissal was filed March 11, 1946 (R. 1199). A timely petition for rehearing was denied June 21, 1946 (R. 1200). Petition for a writ of certiorari was filed July 30, 1946. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the allegations of the First Amended Complaint pertaining to the Third Cause of Action therein set forth, as supplemented by the Bill of Particulars, seeking reformation of a written contract by striking therefrom a provision that either party might terminate the same without cause upon thirty days written notice and seeking recovery of $485,864.42 as damages for breach of the contract as thus modified, which according to Petitioner thereby became one for life-time employment, stated facts upon which relief could be granted.

STATEMENT

Petitioner had been for many years an insurance agent in the employ of Respondent life insurance company. On or about March 7, 1942, he instituted an action against the company in the state courts of the State of Washington, setting forth four causes of action (R. 11). This proceeding was duly removed to

the appropriate District Court of the United States upon the sole ground of diversity of citizenship (R. 19). Petitioner now acquiesces in the disposition by the lower courts of all causes of action except the third (Pet. 1).

In the record at the pages hereinafter indicated the opinions and decisions of the lower courts in respect of the first, second and fourth causes of action respectively, if of interest here, are set forth, namely: First cause of action—R. 1114-1122, 1144, 1165-1172, 1182-1183; Second cause of action—R. 1122, 1144, 1167, 1183; Fourth cause of action—R. 1126-1129, 1130-1131, 1137-1138, 1144-1145, 1172-1175, 1183-1185.

As to the Third Cause of Action Petitioner seeks the instant review upon certiorari.

This Third Cause of Action is set forth in the First Amended Complaint (R. 26) which was filed in the District Court on April 28, 1942 (R. 40).

In respect to the Third Cause of Action, Respondent served and filed two motions. One was for a more definite statement or for a bill of particulars (R. 114). The other was for dismissal upon the ground that plaintiff therein failed to state a claim upon which relief could be granted (R. 113).

In voluntary compliance with the first of these motions, Petitioner served and on November 3, 1942, filed a Bill of Particulars (R. 119).

Upon due consideration of the First Amended Complaint, the Bill of Particulars, the voluminous briefs

submitted, and after hearing prolonged oral arguments, the District Court on March 12, 1943, filed a written opinion granting the motion to dismiss (R. 147) and shortly thereafter a formal order to this effect was duly entered (R. 145).

This opinion of the District Court was adopted by the Circuit Court of Appeals upon the subsequent appeal as the opinion of that court in affirming the judgment of dismissal (R. 1198). It is printed in the Appendix, *infra*, pp. 9-15.

The question decided by the lower courts on this point was a question of law upon the pleadings involving solely the construction of written instruments. The gist of plaintiff's complaint on this score was that under the terms of written contracts which he pleaded, he became entitled to life-time employment by the defendant below and that the invariably recurrent provisions of the successive agency contracts which he pleaded, providing for termination of the employment by either party without cause upon thirty days' written notice were superseded and modified by the so-called "Senior Nylic" benefits to which he became entitled on January 1, 1928 (R. 36). These rights he claimed by reason of acceptance in writing by defendant on September 16, 1910 (R. 29) of an application made by plaintiff on August 17, 1910, to become a member of "Nylic" as outlined in Exhibit F attached to his complaint (R. 91). Petitioner sought reformation of the applicable written agency agreement (Exhibit D, R. 50) and damages for an alleged breach thereof, resulting from termination of the agreement

by Respondent on August 22, 1936, pursuant to the specific provisions therein contained.

The cause of action here under consideration incorporated by reference (R. 35) the plaintiff's First and Second Causes of Action set forth in the same amended complaint. Attached to the said complaint also, and incorporated by reference, were six written contracts (R. 27). In addition, the Bill of Particulars with reference to the Third Cause of Action covered eight pages of record (R. 121-129). The pleadings and written instruments required to be considered by the Courts in considering the motion to dismiss cover over one hundred pages of record (R. 26-129).

ARGUMENT

The courts below correctly decided the question of the construction of the contracts between the Respondent insurance company and Petitioner, its agent to solicit insurance, with reference to the extent and duration of Petitioner's rights thereunder. In view of the lengthy character of the documents requiring consideration in the determination of those questions, we have attached hereto in the Appendix, *infra*, pp. 17-88, a detailed analysis of the documents and a brief on the merits in support of the decision of the lower courts. Reference thereto will demonstrate how preposterous and totally unsupported in the Record are many of the assertions in Petitioner's brief. In the Appendix also, is printed the decision of the District Court which was adopted by the Circuit Court of

Appeals (*infra*, p. 9) and upon which we might well rest as far as the merits are concerned.

It seems manifest to us, however, and we respectfully urge that the instant petition discloses no proper occasion for the issuance of the writ sought. The case is an ordinary one for alleged breach of a contract of employment which is in the Federal Courts solely by reason of diversity of citizenship. No constitutional question is raised, no Federal statute is involved, no conflict in the Circuits is asserted. No matter of public concern is involved unless Petitioner's argument is sound that the mere fact that the Respondent is a mutual insurance company makes it such or because he guesses that many of Respondent's agents have similar contracts. There are no apposite local decisions which have not been properly regarded. Indeed, Petitioner asserts there are no precedents for the Third Cause of Action (Br. 29).

On the last-mentioned point Petitioner does cite (Br. 20) two Washington cases on the proposition that when a party binds himself to do an act in a contract, which can only be done by co-operation with the other party, an obligation on the part of the latter to co-operate is implied. Such cases, however, announce no peculiar local rule and were fully considered by the Courts below. To seek to make them applicable Petitioner contends that as a "Senior Nylic" he engaged to devote all of his time, talents and energies to the Company's service in soliciting personally for business throughout his life (Br. 11). This is the cornerstone of Petitioner's argument. Yet the provisions of the

contract which he pleaded expressly excepted "Senior Nylics" from the requirement of exclusive service (R. 109). The Courts below so found and further decided, in accordance with the written agreement, that Petitioner had an express option to terminate his employment at any time on thirty days' notice.

We submit that there is nothing in the nature of this litigation which should induce this Court to exercise its sparingly-used power to issue the writ of certiorari to the Circuit Court of Appeals. *Forsyth v. Hammond*, 166 U.S. 506, 41 L. ed. 1095; *Hamilton Brown Shoe Co. v. Wolf Bros. &Co.*, 240 U.S. 251, 258, 60 L. ed. 629; Rule 38(5) Revised Rules of the Supreme Court of the United States.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

RAYMOND G. WRIGHT
CLARENCE R. INNIS
ARTHUR E. SIMON
Attorneys for Respondent.

APPENDIX I

OPINION OF DISTRICT COURT

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

F. C. MOSER, *Plaintiff,*

vs.

NEW YORK LIFE INSURANCE COMPANY, a corporation, *Defendant.*

No. 503

MESSRS. PEYSER & BAILEY,
1415 Vance Building,
Seattle, Washington.

For Plaintiff.

MESSRS. WRIGHT & INNIS,
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Seattle, Washington.

For Defendant.

This matter is before the court upon defendant's motion to dismiss the third cause of action of plaintiff's amended complaint for failure to state a claim upon which relief can be granted.

It seems to me after a careful consideration of the allegations of such cause of action, of the representations claimed, of the terms of the several contracts between the parties made a part of the same, of the plaintiff's bill of particulars, and of the host of authorities cited by both sides, as well as of authorities found on independent search, that the motion is well founded.

Counsel will understand that the following is in-

tended to let them and the parties hereto know how certain phases of the matter appear to me rather than as a complete or formal memorandum opinion.

Exhibit "D," the contract dated December 31, 1927, by its terms effective beginning January 1, 1928, and in effect when defendant terminated plaintiff's agency, contains the following provision:

> "Either party hereto may without cause terminate this agreement upon thirty days' written notice." (From Section 20 of Exhibit "D").

But even if the parties had not executed Exhibit "D" I still do not believe that the third cause of action would be good against such motion. In each agency contract between the parties prior to Exhibit "D" we find substantially the same provision. For instance, Exhibit "C", which was the contract dated August 17, 1910, by its terms effective beginning January 1, 1911 and in force until January 1, 1928, when it was superseded by Exhibit "D", states:

> "18th. It is agreed that either party hereto may without cause terminate this agreement upon thirty days' written notice."

True, plaintiff alleges that he completely gave up other employment, became a full-time soliciting agent for defendant, and applied for Nylic membership under representations that after he should become a Senior Nylic he would be entitled to a life agency in addition to the Nylic payments specified by Nylic 2 (Exhibit "F") for a Senior Nylic. Now, the terms of the several agency contracts not only do not con-

tain any such provisions but in each instance completely negative the same.

Since each agency agreement specifically states that either party may without cause, on thirty days' written notice, terminate the agency relation certainly very clear and unambiguous language would be required in the provisions of Nylic 2, even under the allegations of plaintiff, to nullify such agency agreement provisions for termination. There is no express language whatever in Nylic 2 (Exhibit "F") providing for any life agency for Senior Nylics nor providing that the termination without cause of the agency relations shall not apply to agents after they become Senior Nylics. It can, therefore, only be by implication that the express provisions of each agency contract can be nullified as contended by plaintiff.

Unquestionably, a Senior Nylic can receive, and unquestionably plaintiff as a Senior Nylic has for several years been receiving, the Senior Nylic benefit payments without continuing to be an agent after becoming a Senior Nylic. Nylic 2 contemplates that many Senior Nylics will cease to be agents some time after becoming Senior Nylics and further contemplates that nevertheless the Senior Nylic payments will still be paid. Thus, a Senior Nylic does not have to be an agent for life to receive Nylic payments for life.

Plaintiff, in effect, argues that the third cause of action shows he was promised permanent employment; that permanent employment necessarily means

only life employment; and that moreover, it is against public policy for any Senior Nylic not to have life employment as an agent in addition to receiving the Nylic payments for life.

I do not find in Nylic 2 any requirement that any Nylic member or any Senior Nylic should have permanent employment as an agent. At most there are only expressions of the desirability of permanency of agency, which expressions apply just as much to such desirability from the standpoint of the company as from that of the agent, and apply just as much to the period before as to the period after an agent should become a Senior Nylic.

Plaintiff concedes that during the twenty-year period before he became a Senior Nylic that his agency was terminable by either party without cause upon thirty days' written notice and hence in effect concedes that it would not have been against public policy for the defendant to have cancelled plaintiff's agency without cause after even nineteen years' service although such cancellation would have ended his Nylic membership and his chance to have ever become a Senior Nylic. And such substantially is the holding of *Bone v. New York Life Ins. Co.* (Minn. 1925) 206 N.W. 452. If termination just short of the time required for qualifying as a Senior Nylic is not against public policy then it seems a similar termination thereafter with far less injurious result to the agent would not be.

Moreover, "permanent employment" is not neces-

sarily synonymous with "lifetime employment." According to the dictionaries and numerous legal decisions the term "permanent" as applied to employment means that it is contrasted with temporary employment. In fact, in plaintiff's brief we find that "permanent employment" is the antonym of "temporary employment." Therefore, it appears that any employment which is sufficiently long as clearly not to be temporary would be permanent. In such connection see *McKelvy v. Choctaw Cotton Oil Co.*, 152 P. 414; *Combs v. Standard Oil Co. of Louisiana*, 59 S.W. (2d) 525; *Faulkner v. Des Moines Drug Co.*, 90 N.W. 585, 586; *New England Mutual Life Ins. Co. of Boston, Mass., v. Hurst*, 199 A. 822, 826.

Let it be assumed, however, that under the terms of Nylic and the promises and representations alleged to have been made to plaintiff that plaintiff prior to December 31, 1927, was entitled on January 1, 1928, by becoming a Senior Nylic on that day, to a life agency in spite of the clause of the agency contract then in force (Exhibit "C" made in 1910) providing for termination without cause on notice. Plaintiff certainly could have exchanged any such right to a life agency for a terminable agency after he became a Senior Nylic, which terminable agency would entitle him to a greater compensation.

Exhibit "D" provided for a higher schedule of compensation to plaintiff as a soliciting agent effective the same day plaintiff was to become a Senior Nylic and specified in unmistakeable words:

"Either party hereto may without cause ter-

minate this agreement upon thirty days' written notice."

If Exhibit "D" and Nylic 2 be deemed but parts of one contract, as plaintiff contends they should be, we still find two specifications—first, that the period of plaintiff's agency is subject to section 20 of Exhibit "D" and may be terminated as therein provided; and second, that Exhibit "D" shall not affect plaintiff's Senior Nylic membership. In other words, the parties agreed that the agency might be terminated by either party without cause but that the Senior Nylic membership should nevertheless continue.

To me the conclusion is unescapable that whether previously plaintiff did or did not have the right to a lifetime agency as a Senior Nylic in any event he surrendered any such right by entering into Exhibit "D" with its higher schedule of compensation.

It cannot be overlooked that Exhibit "D" was made in contemplation of plaintiff's being a Senior Nylic for it expressly specified that plaintiff could only be a Senior Nylic during its effective life. Exhibit "D" nevertheless provided for agency termination without cause.

True, plaintiff now asks the court to reform Exhibit "D" so as to eliminate the provision he does not like while retaining the terms that are favorable to him. That is, plaintiff prays this court to now write as of about fifteen years ago the contract that

plaintiff today wishes he had insisted on in 1927. The third cause of action moved against does not contain the allegations necessary for any such relief. Whether or not the defendant has been as ungrateful towards plaintiff as the third cause of action alleges is not for this court to determine. Plaintiff and defendant, each in Exhibit "D", unmistakably agreed that either with respect to the agency might "without cause" upon thirty days' written notice be ungrateful to the other.

The motion to dismiss the third cause of action must be granted. Formal order after notice is requested.

Dated March 12, 1943.

LLOYD L. BLACK,
United States District Judge.

APPENDIX II

THE MERITS OF PETITIONER'S CLAIM

STATEMENT OF THE CASE

In the language of the complaint the relief sought by plaintiff under this Third Cause of Action was as follows (R. 39):

> "3. On plaintiff's Third Cause of Action:
>
> "(a) That 'Exhibit D' hereto attached be corrected or reformed to express the true intent of the parties, and to reconcile it with the full contract and agreement between the parties, particularly relating to the right to discharge plaintiff, by striking from section 20th of said 'Exhibit D' hereto attached the words 'either party hereto may without cause terminate this agreement upon thirty days written notice,' together with such other equitable relief as may appear proper in the premises;
>
> "(b) That the plaintiff be awarded judgment against the defendant for Four Hundred Eighty-Five Thousand Eight Hundred Sixty-Four Dollars and Forty-Two Cents ($485,864.42) together with interest thereon."

It is believed that an accurate and forthright analysis of the allegations of the First Amended Complaint which pertain to the Third Cause of Action, as supplemented by the Bill of Particulars (which became a part thereof pursuant to Rule 12 (e) of the Federal Rules of Civil Procedure) and an analysis of the relevant written instruments which are a part of the alleged Third Cause of Action are

essential if this Court is to consider the decisions below on their merits. Petitioner's petition and brief do not adequately state the material facts upon which the decision of the lower courts was based.

The Allegations of the Alleged Third Cause of Action

In the alleged Third Cause of Action plaintiff, by reference, incorporates allegations set forth in the first and second causes of action alleged in his First Amended Complaint. Obviously many of the allegations in the said first and second causes of action are not relevant or material to the alleged Third Cause of Action or to the relief sought by plaintiff therein.

The material and relevant allegations in the Third Cause of Action, as supplemented by the Bill of Particulars, are as follows:

From October 7, 1907, to and including August 22, 1936, plaintiff was an agent of defendant employed for the purpose of soliciting applications for life insurance (Par. III First Cause of Action, R. 27).

Annexed to the First Amended Complaint and made a part thereof and a part of the alleged Third Cause of Action are Exhibits "A", "B", "C", "D", "E" and "F" (Par. IV First Cause of Action, R. 27).

Exhibit "A" (R. 41) is the written agency agreement dated October 7, 1907, pursuant to which plaintiff was first employed by defendant as a part-time agent. This agreement was superseded by the written agreement dated January 1, 1908, which is Exhibit

"B" (R. 70). This agreement (Exhibit "B") was superseded by a subsequent written agreement dated August 17, 1910, which is plaintiff's Exhibit "C" (R. 80). This agreement (Exhibit "C") was superseded by the subsequent written agreement dated December 31, 1927, which is plaintiff's Exhibit "D" (R. 50). (Par. V First Cause of Action, R. 27-28).

The latter agreement (Exhibit D, R. 50) is the written agreement which was effective during the period commencing January 1, 1928 and ending August 22, 1936, the date as of which it was terminated by defendant upon thirty days written notice. This termination was in accordance with the provisions in paragraph 20th thereof wherein it is provided that "either party may without cause terminate this agreement upon thirty days written notice."

Likewise, in Exhibit "A", paragraph 18th (R. 47), in Exhibit "B", paragraph 18th (R. 76), and also in Exhibit "C", paragraph 18th (R. 86) it is provided that either party "may without cause terminate this agreement upon thirty days written notice."

In other words, in each of the successive written agency agreements which are a part of the complaint it was specifically provided that either plaintiff or defendant had the unrestricted right to terminate the agreements without cause upon thirty days written notice.

Exhibit "E" (R. 66) is a written agreement dated May 25, 1931, modifying the agency agreement (Exhibit"D") only in respect of the renewal commissions

payable to plaintiff (Par. V First Cause of Action, R. 27-28).

Exhibit "F" (R. 91) is described by plaintiff as "a system of benefits and partial compensation for its special soliciting agents * * * designated by the defendant as 'Nylic No. 2'." Plaintiff alleges that Exhibit "F" is a copy "of said 'Nylic' contract" (Par. VI First Cause of Action, R. 28-29).

It is alleged (Par. VI First Cause of Action, R. 28-29): "That agents of the defendant corporation, prior to the time the plaintiff entered into his first full-time contract with the defendant, and prior to plaintiff's application for membership in 'Nylic', orally represented to the plaintiff that a 'Nylic' system was to be reinstated by the defendant company, and further represented that if the same was reinstated, the plaintiff would have an opportunity to qualify for a life career in the insurance business with the defendant; provided the plaintiff could survive the requirements of the defendant for the first twenty years, during which period an agent could be discharged with or without cause."

In paragraph VII (First Cause of Action, R. 29) plaintiff asserts that "relying on said representations of the defendant's agents, on or about August 17, 1910, the plaintiff, in writing, made application to the defendant corporation for membership in said 'Nylic,' which application was accepted by the defendant in writing on September 26, 1910;" that defendant at that time gave time credit to plaintiff

for the years 1908, 1909 and 1910; and that said "Nylic" on and after September 26, 1910, was combined in each successive agreement entered into between plaintiff and defendant (which is contrary to the facts as shown by plaintiff's Exhibit "D", paragraph 23d, R. 65), and thereby became a part of the operating contract under which the parties operated (Par. VII, First Cause of Action, R. 29).

It is alleged that as *set forth in Nylic* 2 the Nylic system embraces the qualifying period of twenty years, "during which time the defendant reserved the right to discharge and disqualify the plaintiff with or without cause," (the facts as shown by plaintiff's Exhibits "D" and "F" are that there is no provision in Nylic about termination of the agency agreement); that the defendant did not exercise this right; and that on December 31, 1927, plaintiff qualified as a "Senior Nylic" (Par. VIII, First Cause of Action, R. 30).

Plaintiff alleges that on and after January 1, 1928, Nylic, as set forth in Exhibit "F" (R. 91), and the agency agreement marked Exhibit "D", being the agency agreement dated December 31, 1927, comprised the operating contract between the parties, and states that these "will hereafter be referred to herein as the contract" (Par. IX, First Cause of Action, R. 30).

Plaintiff charges that his qualifying period of Nylic was from January 1, 1908 to January 1, 1928, "according to the terms of 'Nylic 2' as set forth in

Exhibit 'F';" that on January 1, 1928, plaintiff qualified and was accepted as a Senior Nylic by defendant; "that it was an express and implied provision in his employment contract that he was to be employed and was to work for defendant for life, unless said contract was terminated for cause" (which allegation is a conclusion of the pleader contrary to the specific, unambiguous provision in the written agency agreement, plaintiff's Exhibit "D") (Par. II, Second Cause of Action, R. 32); and that "nevertheless, on or about the 23rd day of July, 1936, the defendant arbitrarily, in bad faith and without cause terminated and cancelled the plaintiff's said contract with the defendant already referred to because of malice and to avoid payment of benefits and renewal and conversion commissions to the plaintiff, thereby preventing the plaintiff from further performing his contract with the defendant and disqualifying him from earning a livelihood in the only profession and for the only company he was fitted and trained to serve" (Par. III, Second Cause of Action, R. 32-33).

It is alleged:

> "that section 20th (R. 58) of the agency agreement, marked 'Exhibit D' hereto attached, excluding the first line thereof, reads as follows:
>
> " 'Except as provided in Sections 2d, 5th, 13th and 17th hereof, the termination of this agreement shall in no way affect the right of the second party to any renewal commissions to which the second party would otherwise have been entitled if his employment by the first party had continued'."

Plaintiff asserted that he has at all times fully complied with Sections 2d, 5th, 13th and 17th of said agency agreement (Par. V, Second Cause of Action, R. 34).

It is alleged (Par. II, Third Cause of Action, R. 35) that as set forth in paragraph 1, on page 25 of Nylic 2 (Exhibit "F") (R. 106) he became entitled to receive "Senior Nylic" benefits so long as he lived, the benefits to continue for six months after his death to designated beneficiaries of plaintiff, provided that he "shall not enter the service of any other life insurance company."

It should be here pointed out that there is no charge that the defendant has failed or refused to pay plaintiff the so-called "Senior Nylic benefits." The Senior Nylic benefits to which plaintiff is entitled in accordance with Nylic 2 are not in controversy. It appears conclusively that since January 1, 1928, plaintiff has been and now is being paid by defendant the monthly payments provided by "Nylic 2" for Senior Nylics, and that the amount of each of said monthly payments is $354.89 (Bill of Particulars, R. 129).

It is charged (Par. III, Third Cause of Action, R. 35) that plaintiff has been "maliciously and wrongfully prevented by the defendant from further performing his contract with the defendant, in violation of all express and implied promises and representations made by defendant and its agents to the said plaintiff;" that plaintiff has been prevented by the defendant from earning a livelihood in his

life's profession either with the defendant or any other life insurance company; and that "defendant has maliciously and wrongfully taken and deprived plaintiff of the benefit of plaintiff's experience, association and good will built up over a period of 28 years of service in the defendant's organization."

In Paragraph IV of the Third Cause of Action (R. 36) it is alleged:

> "That line 1 of section 20th of the agency agreement, being 'Exhibit D' hereto attached, reads as follows:
>
> " 'Either party hereto may without cause terminate this agreement upon thirty days written notice.'
>
> "That said provision purporting to give the defendant the right to discharge the plaintiff without cause is superseded and modified by the 'Senior Nylic' contract which took effect January 1, 1928; that said contract expressly and impliedly provided for life benefits and employment for the plaintiff unless dismissed for cause. That said provision purporting to give the defendant the right to discharge the plaintiff without cause is contrary and repugnant to the express and implied intentions of the contracting parties, renders the agency agreement uncertain and inconsistent with the 'Nylic' portion of the contract, and is so oppressive to the plaintiff that it is against public policy."

Plaintiff then alleges (Par. V, Third Cause of Action, R. 36-37):

> "That by reason of the premises, the discharge of the plaintiff by the defendant was wrongful, and through loss of earnings to the plaintiff

occasioned by the defendant, plaintiff has been damaged in the amount of Four Hundred Eighty-Five Thousand Eight Hundred Sixty-Four Dollars and Forty-Two Cents ($485,864.42)."

An Analysis of the Relevant Written Instruments which Are a Part of the Alleged Third Cause of Action.

As a part of the Third Cause of Action plaintiff incorporated, among others, two written instruments which warrant careful consideration. The first is the agency agreement dated December 31, 1927—Exhibit "D" (R. 50)—and the second is "Nylic 2"—Exhibit "F" (R. 91), both of which are annexed to and made a part of the First Amended Complaint.

The Agency Agreement of December 31, 1927 — Exhibit "D"

The situation of the parties at the time they entered into the agency agreement of December 31, 1927, as shown by the allegations in the amended complaint, was as follows:

During the 17 year period expiring December 31, 1927, the agency agreement dated August 17, 1910 (plaintiff's Exhibit "C") was effective, time-credit having been given plaintiff for the years 1908, 1909 and 1910.

When plaintiff became a Senior Nylic on December 31, 1927, he became entitled to receive for life a Senior Nylic monthly income in an amount determined in accordance with the formula set forth in Nylic 2. This monthly income, in the amount of

$354.89 per month (Bill of Particulars, R. 129), is not in issue in this litigation. It has been and is now being paid to plaintiff monthly strictly in accordance with the provisions of Nylic 2, which will hereinafter be discussed in more detail.

Having become a Senior Nylic on December 31, 1927, there were no additional Nylic benefits which could thereafter be earned or obtained by plaintiff. Obviously, it would be to the advantage of plaintiff to obtain, if he could, an agency agreement which would provide for payment to him of larger renewal commissions in respect of policies thereafter issued on applications, if any, thereafter secured by him, than had been payable to him under the agency agreement of August 17, 1910 (Exhibit "C", R. 80). Such an agency agreement is offered to Senior Nylics by the company and was offered to and was accepted by plaintiff.

This is the agency agreement dated December 31, 1927—Exhibit "D"—which became effective January 1, 1928 (R. 50). It superseded the agency agreement of August 17, 1910—plaintiff's Exhibit "C" (R. 80).

Comparison of its provisions with the provisions of the prior agency agreement on August 17, 1910, reveals that the major provisions in both agreements are substantially the same. The only difference of substance is in respect of renewal commissions payable to plaintiff. Under the last agreement dated

December 31, 1927, renewal commissions payable to plaintiff are substantially larger in amount.

Under each of these agreements either party had the right to terminate the agreement without cause upon thirty days written notice. In Exhibit "C", the agreement dated August 17, 1910, the specific provision (R. 86) is:

> "18th. It is agreed that either party hereto may without cause terminate this agreement upon thirty days written notice."

In Exhibit "D", the agreement dated December 31, 1927, the specific provision R. 58) is:

> "20th. Either party hereto may without cause terminate this agreement upon thirty days written notice . . ."

In Exhibit "C" there is no mention of or reference of any kind or character to Nylic or Nylic 2.

In Exhibit "D" the only reference to Nylic is contained in paragraph 23d (R. 65), which is as follows:

> "23d. The second party shall not be eligible for membership in Nylic other than as a Senior Nylic under Nylic No. 2, it being understood and agreed that the execution of this agreement shall in no way alter or affect second party's Senior Nylic membership heretofore acquired subject to all the rules, regulations and conditions of Nylic No. 2."

Naturally there was no such provision in Exhibit "C" because until plaintiff became a Senior Nylic, which he did on December 31, 1927, he was eligible

for membership in Nylic so long as he conformed to the rules, regulations and conditions of Nylic 2.

There are no other provisions in either Exhibit "C" or Exhibit "D" which are relevant to plaintiff's alleged Third Cause of Action.

Before proceeding with an analysis of Nylic 2, it is deemed appropriate, as a summary, to emphasize and direct specific attention to the following facts which appear conclusively from the allegations in the First Amended Complaint and the Bill of Particulars:

(1) The written agency agreement dated December 31, 1927, specifically provided, as did the agency agreement dated August 17, 1910, that either party had the right to terminate the agreement without cause upon thirty days written notice.

(2) On July 23, 1936, the agency agreement of December 31, 1927, was upon thirty days written notice terminated by defendant, the effective date of the termination being August 22, 1936.

(3) None of the provisions of Nylic or Nylic 2 is a part of any of the agency agreements.

(4) No mention of or reference to Nylic or Nylic 2 is made in any agency agreement except the reference above quoted which is contained in paragraph 23d of the agency agreement of December 31, 1927.

(5) There is no ambiguity in any of the agency agreements.

(6) There is no ambiguity in Nylic 2, as will be hereinafter more specifically pointed out.

(7) There is no charge by plaintiff that defendant was guilty of fraud, deception or wrong-doing in respect of the execution of any of the agency agreements or in respect of Nylic 2. Nor is there any charge by plaintiff that he was deceived or was acting under a disability, duress, coercion or undue influence.

(8) The written agency agreement of December 31, 1927 (Exhibit "D") is not in any respect dependent upon or a part of any of the prior agency agreements (Exhibits "A", "B" or "C") and is not in any respect dependent upon or a part of "Nylic 2" (Exhibit "F").

"Nylic 2"

Nylic 2 is referred to by plaintff as "a system of benefits and partial compensation" for defendant's agents. Plaintiff alleges, as hereinabove pointed out, that on or about August 17, 1910, plaintiff in writing made application for membership in Nylic and that his application was accepted by defendant in writing on September 26, 1910 (R. 29).

Plaintiff further alleges that said Nylic "on and after September 26, 1910, was combined with each successive agreement entered into between the plaintiff and defendant corporation and thereby became a part of the operating contract under which the parties hereto operated" (R. 29).

An examination of the written agency agreements and the written provisions of Nylic 2, all of which are a part of the first amended complaint, will reveal conclusively that the facts are to the contrary. The

agency agreement was wholly independent of Nylic. The only relationship between Nylic 2 and the agency agreement is in the Nylic requirement that to be eligible for membership in Nylic the applicant must be employed by defendant under a written agency agreement; otherwise, the applicant would not be eligible to try for and could not obtain the Nylic benefits.

At page 7 of the printed Nylic 2 pamphlet (page 2, plaintiff's Exhibit "F", R. 92), it is stated:

> "The name is derived from combining the initials of the several words which make up our corporate name—New York Life Insurance Co.
>
> "Nylic is a body of persistent and successful men within the ranks of those who create the business of the New York Life Insurance Company.
>
> "It has been established in order to give permanency and character to the work of the soliciting agent. Its effect will be primarily to benefit the agent himself but the ultimate benefits will inure to the policy-holder of the Company."

The fundamental requirement of membership in Nylic 2 was that the applicant must have signed an agency agreement and must remain in good standing under it. Further requirements were that until the agent has become a Senior Nylic he must devote his entire time to the service of the company and personally produce every year at least $50,000 of insurance.

Nylic 2 provides, as a reward for the agent who meets the Nylic requirements, a monthly income not

related to the commissions provided for in the agency agreement but in addition thereto and contingent upon both the annual production of at least $50,000 insurance and the volume of business produced by the agent which had remained in force for the five preceding years, as well as upon compliance with the rules set forth in Nylic 2 (R. 91).

Th Nylic compensation (after five years of service as freshman "Nylics") was fixed roughly by the volume of business which had remained in force for the five preceding years, and upon the length of the agent's Nylic membership. The amount of the Nylic compensation was computed, not upon the amount of premiums collected but upon the amount of insurance written and continued in force for five years (R. 91).

After twenty years of Nylic membership a member became a Senior Nylic and as such was entitled to receive so long as he lived, whether he remained in the service of the company or not, provided only he did not enter the permanent service of another life insurance company, an income based roughly upon the average of his annual Nylic income for the past fifteen years (R. 107).

In the printed Nylic 2 pamphlet at page 25 (page 13, plaintiff's Exhibit "F", R. 106-107) under the heading "Senior Nylics," it is provided as follows:

> "Senior Nylics shall receive so long as they live, provided only they shall not enter the serv-

ice of any other life insurance company, monthly payments as follows:

"The *basis* of business for incomes for the 6th, 7th, 8th, 9th, 10th, 11th, 12th, 13th, 14th, 15th, 16th, 17th, 18th, 19th and 20th years of continuous Nylic membership will be added together and divided by 15. The sum thus obtained will then be averaged with the amount of new business written and placed under the conditions provided above during that year of service as a Third Degree Nylic in which his production was smallest after deducting from same the amount of business placed during said smallest year which has lapsed by non-payment of premium, been canceled, or otherwise terminated up to December 31 of his twentieth Nylic year. His monthly income as a Senior Nylic shall be $0.75 per thousand on the average, or amount, thus obtained."

Plaintiff became a Senior Nylic on December 31, 1927.

Nylic 2 further provided for a pension in case of sickness of the agent (R. 108), as well as a death benefit in the form of a continuation of Nylic compensation for a period of six months after the death of the member (R. 110-111).

Among the general rules of Nylic (set forth here for convenience of the reader) are the following (R. 109-112):

"I. Every Nylic, except Senior Nylics, must devote his entire time, talents and energies to the service of the New York Life Insurance Company in soliciting personally for business. A

Nylic can have no other business or occupation for profit or gain.

"II. No agent, except a Senior Nylic, can continue to be a member of Nylic, who, in addition to devoting his entire time, talents and energies to the Company, does not produce each and every year on other lives than his own, at least $50,000 of insurance (Term and Child's and Pure Endowments excepted.) * * *

"IX. The Company will, for a period of six months, pay to any beneficiary designated in writing by the agent and filed with the Company at its Home Office, or, in lieu of such designated beneficiary, to the estate of any Nylic in good and regular standing in the First, Second or Third Degree, or Senior Nylic, upon his decease, whatever monthly income on account of Nylic the deceased may have been drawing at the time of his death.

"X. Any member of Nylic becoming incapacitated for work of any kind on account of temporary illness may, upon establishing to the Company's satisfaction the fact that said temporary illness was of such a character as to prevent his qualifying as a Nylic member for said year, have said year entirely eliminated from his Nylic record, leaving his future Nylic status to be adjusted by the Company accordingly, or, at the option of the Company have said year counted in Nylic, taking the actual paid business of said year as a basis for future Nylic payments depending on said year.

"XI. Any Nylic who shall in any calendar year pay for less than $50,000 of new insurance in accordance with these rules, shall thereby cease to be a member of Nylic, and all claim to

time credit or to any further payments from the Company on account of Nylic shall thereupon and thereafter be void and of no effect. The Company may cancel and terminate any agent's membership in Nylic and all benefits thereunder for violation of any Nylic rule or of any rule or regulation of the Company.

"XII. The termination of an agent's contract and agency, prior to his becoming a Senior Nylic, or the removal or transfer of an agent, prior to becoming a Senior Nylic, to any country where the Nylic benefits have not been extended by the Company to its agents, terminates his Nylic membership and all his Nylic rights.

"XV. This publication is issued subject to all the rules and regulations of the Company that govern the conduct of its business.

"XVI. The Company reserves the right in its discretion, at any time and from time to time, to alter, amend or repeal any and all of the rules and conditions of Nylic as herein expressed by later editions of this publication. Provided, however, such changes shall be effective as to future business only. No change shall be made in the amount of business which a member, under these rules, in good standing, shall be required to write to maintain membership, nor in the basis of the Nylic compensation of such member."

In Nylic 2 there is no reference of any kind or character to the member's agency agreement, except that one is not qualified to become a member of Nylic unless he has signed an agency agreement and remains in good standing under it.

In the printed Nylic 2 pamphlet—plaintiff's Ex-

hibit "F" (R. 91)—there are no other provisions which are relevant to plaintiff's alleged Third Cause of Action.

Before proceeding, it is deemed appropriate, as a summary, to emphasize and direct specific attention to the following facts which appear conclusively from the allegations in the First Amended Complaint and the Bill of Particulars:

(1) None of the provisions of Nylic 2 are a part of any agency agreement.

(2) The only reference in Nylic 2 to the agency agreement is the requirement that an applicant for membership in Nylic must have signed an agency agreement and until he becomes a Senior Nylic he must remain in good standing under it.

(3) When a member of Nylic becomes a Senior Nylic he may continue with the company, seek other employment, or retire, as he chooses.

(4) If a Senior Nylic elects not to continue in the company's service, his Senior Nylic benefits will not be jeopardized or affected by a termination of the agency agreement or a severance of his agency relationship with the company. Senior Nylic benefits are payable during the life of the agent and for six months after his death, provided only he does not enter the service of any other life insurance company.

(5) Plaintiff does not charge that defendant has failed to pay him the Senior Nylic benefits payable

to him for life in accordance with the provisions of Nylic 2.

(6) There is no word, phrase, provision or suggestion of any kind or character in Nylic 2 to the effect that a graduated Senior Nylic or Nylic undergraduate of any degree is employed by the company for life, or to the effect that his agency agreement may not be termniated by him or the company upon thirty days written notice in accordance with the specific provisions of the agency agreement.

(7) There is no charge by plaintiff that defendant was guilty of fraud, deception or wrong-doing in connection with plaintiff's application for a Nylic membership. Nor is there a charge by plaintiff that when he applied for such membership plaintiff was acting under a disability or duress or coercion or undue influence.

(8) There is no ambiguity in the provisions of Nylic 2.

(9) There is no provision in Nylic 2 which directly or indirectly modifies or changes any of the provisions of the agency agreement.

(10) There is no provision in Nylic 2 or the agency agreement which provides or reasonably may be construed to mean that membership in Nylic or the attainment of Senior Nylicship was intended to convert or did convert plaintiff's employment under his agency agreement from an employment which either party had the right to terminate at will, upon thirty days written notice (as specifically provided in the

agency agreement), into an employment for life which defendant had no right to terminate except for cause (as contended by plaintiff).

(11) There is not one word, phrase or provision in Nylic 2 or in any of the agency agreements to support plaintiff's conclusion (paragraph IV of Third Cause of Action, R. 36) that the "contract" which took effect January 1, 1928, "expressly and impliedly provided for life benefits and employment for the plaintiff unless dismissed for cause."

(12) There is not one word, phrase or provision in Nylic 2 or in any of the agency agreements (Exhibits "C" and "D") which supports plaintiff's conclusion that the specific provision in the agency agreement that either party may without cause terminate the agreement upon thirty days written notice is contrary and repugnant to the express or implied intentions of the parties, or the charge that the agency agreement is "uncertain and inconsistent with the Nylic portion of the contract, and is so oppressive to plaintiff that it is against public policy."

Alleged Oral Representations Relied Upon by Plaintiff to Contradict and Vary the Express, Unambiguous and Complete Terms of the Agency Agreement.

Plaintiff's Third Cause of Action was predicated solely upon his allegation (Par. V, Third Cause of Action; R. 36-37) that the discharge of plaintiff by defendant was wrongful.

Plaintiff recognized that if the defendant had the right to terminate his agency agreement dated

December 31, 1927 (Exhibit "D"), in accordance with the specific provisions in the agreement, plaintiff's Third Cause of Action would fail to state a claim against defendant upon which relief could be granted.

Consequently, in an effort to change and modify the plain, specific and unambiguous provisions of the complete written agency agreement, plaintiff alleged (Par. VI, First Cause of Action, R. 28) that "agents of defendant corporation *prior* to the time that the plaintiff entered into his first full-time contract with defendant (January 1, 1908), and *prior* to the plaintiff's application for membership in Nylic (August 17, 1910), orally represented to plaintiff that a Nylic system was to be reinstated by the defendant company, and further represented that if the same was reinstated the plaintiff *would have an opportunity to qualify for a life career in the insurance business with the defendant*, provided the plaintiff could survive the requirements of the defendant for the first twenty years during which period an agent could be discharged with or without cause." (Italics supplied.)

In the amended complaint we find no other allegations of facts (as distinguished from conclusions of the pleader) which could be relied upon by plaintiff as a basis for his prayer for reformation of the agency agreement, or as a basis for his prayer for damages in the amount of $485,864.42 which he sought to recover by reason of his claim that his discharge by defendant was "wrongful."

SUMMARY OF ARGUMENT

The District Court properly dismissed the third cause of action in plaintiff's First Amended Complaint, and the Circuit Court of Appeals properly affirmed.

Plaintiff's action was predicated solely upon his allegation that the termination of his written agency agreement with defendant was wrongful.

Plaintiff served as agent of defendant under a written agency agreement (dated December 31, 1927). In this agreement it is specifically provided that either plaintiff or defendant had the unrestricted right to terminate it upon 30 days' written notice.

In accordance with the express provision of the written agency agreement defendant, upon 30 days' written notice, terminated same, the termination being effective August 22, 1936.

Plaintiff sought reformation of the written agency agreement to eliminate the provision which vested in either party the unrestricted right to terminate it upon 30 days' written notice, and damages in the amount of $485,864.42 which plaintiff claimed he sustained by reason of the alleged wrongful termination.

It appears conclusively that there is no word, phrase provision or suggestion in the written agency agreement, or Nylic 2, or any other written instrument or prospectus which reasonably may be construed to provide or to suggest directly or indirectly that defendant agreed to employ plaintiff for life or

agreed this his employment would be terminable only for cause.

Consequently, it appears conclusively that there was no breach by defendant of any written agency agreement, or Nylic 2, or any other agreement, and no violation by defendant of any duty owed by it to plaintiff.

The express, unambiguous and complete terms of the written agency agreement may not be changed, modified or contradicted by the oral representations relied upon by plaintiff. These oral representations, made prior to August 17, 1910, as alleged and stated in the bill of particulars, were that in the event a Nylic system were reinstated by defendant plaintiff would have "an opportunity to qualify for a life career in the insurance business with defendant, provided plaintiff could survive the requirements of the defendant for the first 20 years during which period an agent could be discharged without cause." These are the only representations upon which plaintiff based the charge that his employment by defendant under the agency agreement of December 31, 1927, or under any other agreement was an employment for life which could not be terminated except for cause.

It is suggested that apart from all other considerations statements made to plaintiff, as alleged by him, that he "would have an opportunity to qualify for a life career in the insurance business with defendant" may not reasonably be considered or construed as cre-

ating a binding contractual obligation on the part of defendant to employ plaintiff for life.

Here, moreover, it conclusively appears that the agency agreement is complete in itself. It was formally executed. It is an agency agreement, not an insurance contract. The parties were dealing at arm's length. Plaintiff was under no disability. He did not charge mutual mistake, fraud, duress or undue influence. There was no fiduciary relationship between plaintiff and defendant. There is no issue in respect of public policy, either in fact or as a matter of law. There was no "consideration other than services to be performed." There was nothing novel or unique in the situation. There is no strange or unusual rule of evidence or construction here applicable.

The general rule which has been followed universally and the rule applicable here is that extrinsic or parol evidence is not admissible "to supply, contradict, enlarge or vary the words of a written contract, and when a contract is reduced to writing all matters of negotiation and discussion on the subject incident to the writing are excluded, being merged in the written instrument."

This rule is one of positive and substantive law and by the United States Supreme Court is considered as "unvariable and salutary."

The provisions in the written agency agreement that either party might terminate it without cause were not, as contended by plaintiff, "contrary and repugnant to the express and implied intentions" of

the parties, and as a matter of fact and law are not oppressive or against public policy.

In addition, alleged contracts for life employment are so unusual that the burden is upon the person claiming under such a contract to allege and prove explicit authority in the representative of the corporate employer to make such a contract in its behalf. Here there was no allegation of such a character. If plaintiff proved all the facts alleged, the most that he could possibly have established would have been an unauthorized contract of hiring not enforceable against the corporation.

Moreover, the allegations in the third cause of action were not sufficient to sustain a decree for reformation as prayed. There was no allegation of fraud, bad faith or inequitable conduct. There was no allegation of mutual mistake. There was no allegation that the written words in the agency agreement, express or contain the real intention of neither of the parties.

There was in fact, contrary to the assertions of petitioner, no contemporaneous oral agreement alleged by plaintiff which could possibly be consistent with the express provisions of the subsequently executed written agreement in which it is provided that either party had the right to terminate the agreement on 30 days' written notice.

In addition, if it be considered that the facts alleged by plaintiff might possibly be construed as alleging a contemporaneous oral agreement, as petitioner seems

to contend, such an agreement would be void under the Statute of Frauds because it could not possibly have been performed within one year from the making thereof. Obviously, performance would have been impossible prior to December 31, 1927, which is more than 17 years after it is claimed by plaintiff that the alleged representations were made.

It follows that it appears conclusively from the allegations of the complaint and the bill of particulars (1) that defendant had the unrestricted right to terminate plaintiff's employment as specifically provided in the Agency Agreement; (2) that there has been no breach by defendant of any of the Agency Agreements or Nylic 2 or any other agreement and no violation of any duty owed by defendant to plaintiff; (3) that the Third Cause of Action does not state a claim under which the court might properly enter a decree reforming the Agency Agreement, Exhibit "D", or grant plaintiff any other equitable relief as prayed; and (4) that the allegations in the Third Cause of Action do not state a claim under which the court might properly enter judgment in favor of plaintiff in any sum for damages claimed to have been suffered by reason by the termination of plaintiff's employment.

The judgment of dismissal entered by the District Court was properly affirmed by the Circuit Court of Appeals.

ARGUMENT

I.

There Is No Legal Relationship Between Nylic 2 and any of the Agency Agreements

Contrary to the assertions of petitioner, it conclusively appears from the allegations of the Complaint and the exhibits which are a part thereof that the only relationship between Nylic 2 and any agency agreement is that to become eligible for membership in Nylic the applicant must be employed by defendant under an agency agreement, and in addition he must, until he has become a Senior Nylic, remain in good standing under the agency agreement.

In this case plaintiff, for example, would not have been eligible for membership in Nylic if he had not been employed by defendant under an agency agreement. This agreement is the agency agreement of August 17, 1910 (Exhibit "C" attached to the Complaint). If at any time during the 17-year period expiring December 31, 1927, either plaintiff or defendant had terminated this agency agreement, with or without cause, as either clearly had the right to do, plaintiff's Nylic membership would have terminated, as provided in Nylic General Rule XII.

Obviously there were agents having agency agreements with defendant who did not apply for or hold a membership in Nylic. There were other agents, having agency agreements, who applied for membership in Nylic, as did plaintiff.

After an application for Nylic membership was

accepted, the applicant became a freshman Nylic. If he met the annual minimum requirements of Nylic, as to production and complied with the other requirements of Nylic, and his agency agreement was not terminated by him or the Company, he might become a first degree, then a second degree, then a third degree and finally a Senior Nylic.

During the period required to attain the status of a Senior Nylic the agent was paid commissions in accordance with the provisions in the agency agreement consisting of both first year and renewal commissions. These commissions were a fixed percentage of the premiums collected for the policies issued upon applications secured by the agent and were paid to the agent in accordance with the provisions of the agency agreement, even though the agent did not meet the minimum requirement for continued membership in Nylic, and even though the agent might lose his membership in Nylic.

The Nylic benefits, which constitute additional reward if earned by the agent, are paid to him monthly throughout the 20-year Nylic period, and are based upon the principal amount of the policies issued upon applications procured by the agent and kept in force. The amount of the premiums charged for these policies is not a factor in the computation of the Nylic monthly payments.

If the agency agreement be terminated by either the agent or the Company after the agent has become a first, second or third degree Nylic and before he

has been accepted as a Senior Nylic, the agent is no longer eligible to receive Nylic benefits and consequently the Nylic benefits, if any, which he had been receiving prior to the termination of the agency agreement are not thereafter paid to him. At all times, however, wholly independent of any provision of Nylic and wholly independent of the continuous maintenance of the agent's Nylic membership in good standing, the agent's rights to commissions are fixed by the agency agreement.

Upon being accepted as a Senior Nylic, as was plaintiff (December 31, 1927), the agent is entitled to the Senior Nylic benefits for life as provided in Nylic 2. . Consequently, a termination of the agency agreement of a Senior Nylic, by either the agent or the Company, has no effect upon the monthly payments for life to which a Senior Nylic has become entitled. It follows that once having attained the status of a Senior Nylic the agent, as a Nylic graduate, has obtained the maximum benefits of Nylic 2, and thereafter there is nothing that can be done by the agent or the Company which will increase or decrease the Senior Nylic monthly income which is payable to a Senior Nylic for life.

The case of plaintiff is a graphic illustration. As shown by the pleadings, on December 31, 1927, when plaintiff became a Senior Nylic, he had earned the right to receive for life an income of $354.89 per month. Each month since January 1, 1928, plaintiff has received this amount from defendant and will

continue to receive a like amount each month so long as he lives. This means that the aggregate amount of Senior Nylic monthly payments received by plaintiff from the Company to date is in excess of $79,495.36 and that in addition plaintiff will receive $4,258.68 each year during the remainder of his life, provided he does "not enter the service of another life insurance company" in violation of the rule of Nylic 2 applicable to Senior Nylics.

The foregoing sums are the amounts paid to plaintiff as Senior Nylic benefits since December 31, 1927. During the 20-year period prior to December 31, 1927, plaintiff also received the very substantial commissions, first year and renewal, which are provided for in the agency agreement of August 17, 1910, and the Nylic payments payable prior to January 1, 1928, as provided in Nylic 2.

To obtain the said monthly Senior Nylic payments for life plaintiff was not required to continue in the service of defendant after December 31, 1927. On January 1, 1928, he was and now is, as he was at all times prior thereto, free to engage in any other business he might prefer.

If plaintiff had not desired to continue as an agent of defendant, he was nevertheless free to continue in the life insurance business. If he entered the service of any other life insurance company in violation of the rule of Nylic 2 that a Senior Nylic may not "enter the service of another life insurance company," the Company would be released from its obligation to

continue said monthly Senior Nylic payments. In this case there is no occasion or necessity for considering the effect of such a prohibition or the question as to what would or would not constitute entering "the service of another life insurance company," for two obvious reasons: The first is that plaintiff alleges that he did not enter the service of another life insurance company, and the second is that the Company has paid and is now paying plaintiff the monthly Senior Nylic payments strictly in accordance with the provisions of Nylic 2.

In this connection it seems appropriate to point out that after the termination of the agency agreement in 1936 plaintiff continued in the life insurance business. In the Bill of Particulars (R. 128-129) plaintiff states that policies of life insurance were issued during the years 1937, 1938 and 1939 by numerous life insurance companies other than defendant, on applications procured by plaintiff. This, it appears, was not deemed by plaintiff or defendant to be a violation of the Nylic 2 prohibition against a Senior Nylic "entering the service of another life insurance company."

On December 31, 1927, when plaintiff became a Senior Nylic he had then obtained, as before indicated, the maximum Nylic benefits. There were no other or further Nylic benefits of any kind or character which he could thereafter acquire. There is no provision whereby having graduated and attained the status of Senior Nylic, an agent may go forward in an

effort to become a double Senior Nylic or to increase his Senior Nylic benefits.

Plaintiff indicated a desire to continue as an agent of the defendant. Naturally, since there was no possibility of plaintiff obtaining any greater Nylic benefits, it was in the interest of plaintiff to obtain, if he could, a new agency agreement, under which larger renewal commissions would be payable to him than were payable in accordance with the agency agreement under which he had been working during the 20-year period of his Nylic membership. The result of his negotiations with defendant was the new and last agency agreement of December 31, 1927 (Exhibit "D" attached to First Amended Complaint).

It seems definite and certain that neither in this agency agreement nor in Nylic 2 is there any support for plaintiff's assertion that the agency agreement (Exhibit "D") is a part of or has any legal relationship to Nylic 2, or that Nylic 2 is a part of or has any legal relationship to the agency agreement. Each of the agency agreements is wholly independent of and separate and apart from Nylic 2, and Nylic 2 is wholly independent of and separate and apart from each of the agency agreements. The allegations in the amended complaint and plaintiff's exhibits which are a part thereof may not be reasonably construed otherwise.

II.

Each Agency Agreement Is Wholly Independent of and Separate and Apart from any Preceding Agency Agreement and Nylic 2.

Likewise, there is not in any of the agency agreements or in Nylic 2 the slightest support for plaintiff's assertion that the agreement of December 31, 1927 (Exhibit "D"), is a part of or has any relationship to the agency agreement of August 17, 1910 (Exhibit "C"). Each of the agency agreements is independent of and separate and apart from any preceding agency agreement. This is shown not only by the agreements themselves but also by the allegations contained in paragraph V of the First Cause of Action in the First Amended Complaint (R. 27).

It is alleged by plaintiff that the agency agreement of October 7, 1907 (Exhibit "A") was superseded by the agency agreement of January 1, 1908 (Exhibit "B").

It is also alleged that the agreement of January 1, 1908 (Exhibit "B") was superseded by the agency agreement of August 17, 1910 (Exhibit "C").

Likewise, as alleged by plaintiff, the agency agreement of August 17, 1910 (Exhibit "C") was superseded by the agency agreement of December 31, 1927 (Exhibit "D").

The agency agreements which are before the court as a part of plaintiff's amended complaint may not be reasonably construed otherwise.

III.

It Appears Conclusively from the Complaint and the Bill of Particulars that There has Been No Breach by Defendant of any of the Agency Agreements or Nylic 2, or any other Agreement, and no Violation by Defendant of any Duty Owed by it to Plaintiff.

Each of the agency agreements, including the agreement of December 31, 1927 (Exhibit "D") was terminable by either of the parties upon thirty days' written notice.

As before indicated, there is not one word, phrase or sentence in any of the agency agreements which may reasonably be construed to suggest, directly or indirectly, that defendant agreed to employ plaintiff for life, or agreed that plaintiff's employment would be terminable only for cause.

To the contrary, it appears conclusively from the allegations in the First Amended Complaint and the Exhibits which are a part thereof that plaintiff signed four separate and independent written agency agreements, the first on October 7, 1907, the second on January 1, 1908, the third on August 17, 1910, and the fourth and last on December 31, 1927; and in each of these agency agreements it is specifically provided that each may be terminated by either party upon thirty days' written notice.

The last agreement (Exhibit "D") was terminated by defendant upon thirty days' written notice, the notice of termination being dated July 23, 1936.

It follows that the termination of the agency agree-

ment of December 31, 1927, was not a violation of any agreement or a breach of any duty owed by defendant to plaintiff.

It also appears conclusively from the complaint and the bill of particulars that there has been no breach by defendant of Nylic 2.

Moreover, there is no charge here that plaintiff has not been paid all sums payable to him in accordance with the provisions of Nylic 2. All such sums have been paid to him.

Nor is there any provision in Nylic 2 that any Nylic member or Senior Nylic should have permanent employment as an agent. At most, as suggested by the District Court, there are only expressions of the desirability of permanency of agency, which expressions apply just as much to such desirability from the standpoint of the company as from that of the agent and apply just as much to the period before as the period after an agent became a Senior Nylic.

Moreover, "permanent employment" is not necessarily synonymous with "lifetime employment." As stated by the District Court (R. 150):

> "According to the dictionaries and numerous legal decisions the term 'permanent' as applied to employment means that it is contrasted with temporary employment. In fact, in plaintiff's brief we find that 'permanent employment' is the antonym of 'temporary employment.' Therefore, it appears that any employment which is sufficiently long as clearly not to be temporary would be permanent. In such connection see *McKelvy v. Choctaw Cotton Oil Co.*, 152 Pac. 414;

Combs v. Standard Oil Co. of Louisiana, 59 S.W. (2d) 525; *Faulkner v. Des Moines Drug Co.*, 90 N.W. 585, 586; *New England Mutual Life Ins. Co. of Boston, Mass. v. Hurst*, 199 Atl. 822, 826."

Consequently, it conclusively appears that defendant's termination of the agency agreement of December 31, 1927, was not a breach of Nylic 2.

If it be assumed, however (contrary to the facts) that under the terms of Nylic or the oral representations alleged to have been made to him in 1908 or 1910, plaintiff, prior to December 31, 1927, upon becoming a Senior Nylic was on January 1, 1928, entitled to a life agency in spite of the clause of the agency contract then in force (Exhibit "C") providing for termination on notice, plaintiff cannot prevail. In the language of the District Court (R. 151-152):

> "Plaintiff certainly could have exchanged any such right to a life agency for a terminable agency after he became a Senior Nylic, which terminable agency should entitle him to a greater compensation.
>
> "Exhibit 'D' provided for a higher schedule of compensation to plaintiff as a soliciting agent effective the same day plaintiff was to become a Senior Nylic and specified in unmistakable words:
>
> " 'Either party hereto may without cause terminate this agreement upon thirty days' written notice.'
>
> "If Exhibit 'D' and Nylic 2 be deemed but parts of one contract, as plaintiff contends they should be, we still find two specifications — first, that

the period of plaintiff's agency is subject to section 20 of Exhibit 'D' and may be terminated as therein provided; and second, that Exhibit 'D' shall not affect plaintiff's Senior Nylic membership. In other words, the parties agreed that the agency might be terminated by either party without cause but that the Senior Nylic membership should nevertheless continue.

"To me the conclusion is unescapable that whether previously plaintiff did or did not have the right to a lifetime agency as a Senior Nylic in any event he surrendered any such right by entering into Exhibit 'D' with its higher schedule of compensation.

"It cannot be overlooked that Exhibit 'D' was made in contemplation of plaintiff's being a Senior Nylic for it expressly specified that plaintiff could only be a Senior Nylic during its effective life. Exhibit 'D' nevertheless provided for agency termination without cause."

Plaintiff asserts, erroneously, that "it was an expressed and implied provision in the operating contract that plaintiff was to be employed by the defendant for life unless said contract was terminated for cause."

There is no provision in any of the written agency agreements or in Nylic 2 which may reasonably be so construed.

Petitioner, in his brief (Br. 22) as he did below refers to Nylic Rule XII, which provides that the termination of an agent's contract or agency prior to his becoming a Senior Nylic terminates his Nylic membership and all his Nylic rights. This provision

is clear and unambiguous. It means only, that in the event the agency agreement be terminated before the agent has been awarded the maximum rights which a Senior Nylic may obtain, the agent loses any rights he may have theretofore acquired as a first, second or third degree Nylic. Having once attained the status of a Senior Nylic, then the right of the agent to receive thereafter the maximum Senior Nylic benefits, as provided in Nylic 2, becomes wholly independent of any agency agreement. The termination of an agency agreement thereafter would not have the slightest effect upon the right of the agent to such Senior Nylic benefits. This is all that said provision means. It may not reasonably be construed to mean anything else.

Petitioner refers (Br. 24, 25) to paragraph 23 of the agency agreement of December 31, 1927 (Ex. "D"), in which it is provided that plaintiff shall not be eligible after December 31, 1927, for membership in Nylic other than as a Senior Nylic, "it being understood and agreed that the execution of this agreement shall in no way alter or affect the second party's Senior Nylic membership heretofore acquired subject to all the rules, regulations and conditions of Nylic No. 2."

In the written opinion of the District Court, as before indicated, it is stated (R. 151, 152):

> "If Exhibit 'D' and Nylic 2 be deemed but parts of one contract, as plaintiff contends they should be, we still find two specifications — first, that the period of plaintiff's agency is subject to section 20 of Exhibit 'D' and may be terminated

as therein provided; and second, that Exhibit 'D' shall not affect plaintiff's Senior Nylic membership. In other words, the parties agreed that the agency might be terminated by either party without cause but that the Senior Nylic membership should nevertheless continue. (As provided in paragraph 23 of Exhibit 'D'). * * *

"It cannot be overlooked that Exhibit 'D' was made in contemplation of plaintiff's being a Senior Nylic for it expressly specified (in paragraph 23) that plaintiff could only be a Senior Nylic during its effective life. Exhibit 'D' nevertheless provided, for agency termination without cause." (Words in parentheses have been supplied)

Petitioner argues (Br. 25) fallaciously, we suggest, that:

"The result of paragraph 23 (Ex. D, R. 65) *supra*, is either to make the employment contract subservient to all the rights heretofore acquired by appellant under Nylic No. 2 (Ex. F), or in any event to render the effect of the execution of the employment contract so uncertain and ambiguous as to allow the introduction of parol evidence as outlined on appellant's bill of particulars (R. 125)."

There is in fact not one word in said paragraph 23 which even remotely suggests that the agency agreement (Ex. D) is "subservient" to Nylic 2 or to any prior agency agreement. The provision means precisely what the language thereof indicates. When plaintiff became a Senior Nylic, as pointed out before, he was no longer eligible for any additional Nylic benefits. The rights incident to his *Senior Nylic mem-*

bership which he had already acquired naturally remained unaffected and unaltered by the new agency agreement Exhibit D. In simple language this understanding and agreement are set forth in paragraph 23. There is no ambiguity. There is no uncertainty.

Nor may said provision, it is submitted, be reasonably construed to be an agreement that plaintiff's employment under the agency agreement was an employment for life in direct contravention of the specific and unambiguous written provisions thereof.

Petitioner states (Br. 25) that in the bill of particulars it is alleged that a Mr. A. S. Elford, in the capacity of Inspector of Agencies of defendant's Western Department in Seattle, about August 1, 1928, represented to plaintiff, that Section 20 of the agency agreement (Exhibit D) did not apply to plaintiff as a Senior Nylic. Plaintiff argues erroneously that "evidence of this nature is admissible whenever there is an uncertainty as to the nature of an instrument or the intention of the parties to execute the contract, thus, conversations during negotiations may be shown in considering a contract in case of doubt as to meaning of words." This argument of plaintiff, it is suggested, is fallacious for many reasons, among others the following:

There can be no doubt about the meaning of the written words. There is no uncertainty as to the nature of the written agreement or the intention of the parties "to execute the contract."

There is no suggestion that this alleged oral state-

ment of Mr. Elford was made prior to the execution and delivery of Exhibit "D" by plaintiff. If it were made before, then it would be inadmissible because all prior negotiations (if the alleged oral statement may be considered as part of the negotiations) were merged into the subsequently executed written agreement; if after, the alleged oral statement would not be admissible because it would be a delayed attempt to change the specific provisions of a written instrument by parol testimony.

The alleged oral representations *per se* may be reasonably construed to mean only that in the event the agency agreement be terminated as provided in paragraph 20, plaintiff's prior acquired status and rights as a graduate Senior Nylic would not thereby be terminated.

There is no allegation of fact which establishes the slightest authority in Mr. Elford, the Superintendent of Agencies, to make any agency agreement with plaintiff, or to alter or amend or interpret the legal effect of the written provisions of the agency agreement.

There is no situation shown by the allegations which warrants a presumption that plaintiff had any right to rely upon said oral interpretation of the provisions of the written agreement, and as a matter of elementary law plaintiff had no right to rely upon any such interpretation.

As stated in *Johnston v. Spokane & Inland Empire R. Co.*, 104 Wash. 562, 177 Pac. 810, "a party whose

rights rest upon a written instrument which is plain and unambiguous, and who has read or had the opportunity to read the instrument, cannot claim to have been misled concerning its contents or to be ignorant of what is provided therein."

Apart from all of the foregoing reasons, if it be assumed that the entire Paragraph 20 of Exhibit D had been stricken from the contract by reason of the oral representations of Mr. Elford, there would have remained only an agreement for the employment of plaintiff as an agent of defendant for an indefinite time. Such a hiring, as a matter of law, is a hiring at will and no action can be sustained in such a case for an alleged wrongful discharge.

In addition, if the agreement Exhibit D had not superseded the agreement Exhibit C, as it did, the prior agreement would have continued in full force and effect until terminated and under Section 18th thereof (R. 86), as before pointed out, either party had a right to terminate the agreement at will upon thirty days' notice.

Consequently, it is submitted that the alleged oral representations of Mr. Elford, as set forth in the bill of particulars, if made, would be of no factual or legal significance. Petitioner rather intemperately criticizes the Nylic contract (Br. 21). Aside from the immateriality of the outburst and its lack of proper place in a brief before this Court, it may be said that apparently "diabolical slavery" is not a complete description of an arrangement which peti-

tioner alleges to have paid him $28,500 per year and which still pays him retirement pay of $4,285.68 per year for life. There was no slavery about the relationship. Petitioner was not "bound" to respondent for a single moment. He retained at all times the unrestricted right to cease his representation of the company. He was free to do as he wished.

The foundation of the agency relationship was the agency agreement. It—not Nylic 2, — was the "body and trunk of the tree." Unless there be an agency agreement the agent is not eligible to membership in Nylic. A termination of the agency agreement *ipso facto* terminated the Nylic membership and all Nylic benefits except only the benefits to which one who had become a Senior Nylic—a Nylic alumnus—was entitled under the provisions of Nylic 2. These are the specific unambiguous provisions in Nylic 2, as before pointed out in more detail. The basic permanent contract is not Nylic 2. It is and always has been the agency agreement which is the *sine qua non*. Without an agency agreement there can be no Nylic contract and no active membership in Nylic.

There are agents who are not members of Nylic. There are no members of Nylic who do not have an agency agreement with defendant in full force and effect throughout the agent's active Nylic membership. After the agent becomes a Senior Nylic he is no longer an active member of Nylic. He is an alumnus. As a Senior Nylic he is entitled to the full

Senior Nylic benefits even though he does not continue as an agent of the defendant.

Contrary to the suggestions of petitioner (Br. 22), a Senior Nylic is not prohibited from writing insurance for any other company, as shown by the bill of particulars (R. 128, 129) he has written a substantial amount of insurance for other companies since August 22, 1936. Nor was he prohibited from engaging in any other business or occupation for profit or gain (R. 109).

Petitioner's statement (Br. 28) that he is still a Nylic is erroneous. Plaintiff was an undergraduate *Nylic* in good contractual standing until he became a *Senior Nylic*. After he became a Senior Nylic he was thereafter only a Senior Nylic and as such he was not required to devote any "of his time, talents and energies" to the service of defendant (R. 109).

The cases cited by petitioner (Br. 32, 33) are obviously not in point. Here plaintiff was not bound to serve defendant for any length of time. He was free to quit any time he desired. During the period prior to December 31, 1927, so long as plaintiff chose to continue as an agent of defendant, he was required, and properly so it seems, to devote his time exclusively to the business of defendant. That obligation, however, did not continue one second longer than plaintiff desired it to continue, and after December 31, 1927, there was no such obligation.

IV.

The Express, Unambiguous and Complete Terms of the Applicable Written Agency Agreement May Not Be Changed, Modified or Contradicted by the Representations Relied Upon by Plaintiff.

Plaintiff alleged, as before indicated, that prior to the time that plaintiff entered into his first full-time contract and prior to his application for membership in "Nylic," agents of the defendant (whose identity and authority are not alleged) "orally represented to the plaintiff that a 'Nylic' system was to be reinstated by the defendant company, and further represented that if the same was reinstated, the plaintiff would have an opportunity to qualify for a life career in the insurance business with the defendant; provided plaintiff could survive the requirement of the defendant for the first twenty years, during which period an agent could be discharged with or without cause."

These, it appears from the First Amended Complaint and the Bill of Particulars, are the oral representations and the only representations — oral or written — upon which plaintiff may base a charge that his employment by the defendant under the agency agreement dated December 31, 1927, was an employment for life which defendant had no right to terminate at will even though the written agency agreement dated December 31, 1927, and executed at least 17 years after the alleged oral representations

were made, specifically provided that either party had the right to terminate it without cause.

It is suggested that apart from all other considerations statements made to plaintiff, as alleged by him, that he "would have an opportunity to qualify for a life career in the life insurance business with defendant" may not reasonably be considered or construed as creating a binding contractual obligation on the part of defendant to employ plaintiff for life. There was, in fact, no contemporaneous oral agreement at all.

Moreover here, as shown conclusively by the amended complaint and plaintiff's exhibits, the written agency agreement (Exhibit "D") is complete in itself. It was formally executed. It provides that it may be terminated without cause by either of the parties upon thirty days' written notice. It is not an insurance contract. It is an agency agreement. The parties were dealing at arms length. The plaintiff was under no disability. He does not charge mutual mistake, fraud, duress or undue influence. There is no fiduciary relationship between plaintiff and defendant, either in fact or as a matter of law. There is no issue in respect of public policy, either in fact or as a matter of law. There is no "consideration other than services to be performed," either in fact or as a matter of law. Any agent who leaves any prior employment to become a representative of a life insurance company naturally gives up the prior employment. There is nothing novel or unique in such a situation.

In addition, it appears conclusively, that the alleged oral statements or representations could not possibly be consistent with the express provisions of the subsequently executed written agreement. It provides specifically that either party had the right to terminate the agreement on thirty days' written notice. Whatever the prior representations may have been as to the term of plaintiff's employment, they were merged into the written agreement which is definite, certain, unambiguous and complete.

Here there is no strange or unusual rule of evidence or construction which would be applicable. There is not the slightest ambiguity in the written agreements or Nylic 2.

Plaintiff makes vague and obscure charges of "maliciousness." These, we suggest, are not material to any issue presently before the court. Since the agreement may be lawfully terminated at will of either of the parties, the presence or absence of malice would be of no legal significance.

The general rule, universally followed and here applicable and controlling, is that extrinsic or parol evidence may not be relied upon "to supply, contradict, enlarge or vary the words of a written contract." When a contract is reduced to writing "all matters of negotiation and discussion of the subject incident to the writing are excluded, being merged in the written intsrument."

Ferguson v. Lumbermen's Ins. Co., 45 Wash. 209, 211, 88 Pac. 128;

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Allen v. Farmers & Merchants Bank of Wenatchee, 76 Wash. 51, 56, 135 Pac. 621;

Olsen v. Nichols, 86 Wash. 185, 187, 149 Pac. 668;

Union Machinery & Supply Co. v. Darnell, 89 Wash. 230, 234, 154 Pac. 183;

Van Doren R. & Co. v. Guardian Cas. & G. Co., 99 Wash. 68, 168 Pac. 1124;

Thompson & Stacy Co. v. Evans, Coleman & Evans, 100 Wash. 277, 283, 170 Pac. 578;

Shannon v. Prawl, 115 Wash. 106, 112, 196 Pac. 635;

Benson v. Metropolitan Life Ins. Co., 126 Wash. 125, 217 Pac. 709;

Samarzich v. Aetna Life Ins. Co., 180 Wash. 379, 385, 49 P.(2d) 129;

Asher Bros. General Illuminating Co. v. General Illuminating Co., 193 Wash. 105, 108, 74 P.(2d) 495;

Sears, Roebuck & Co. v. Nicholas, 2 Wn.(2d) 128, 132, 97 P.(2d) 633;

Smith v. Johnson, 2 Wn.(2d) 351, 359, 98 P.(2d) 351;

Alaska Pacific Salmon Co. v. Matthewson, 3 Wn.(2d) 560, 563, 101 P.(2d) 606.

The foregoing are some of the numerous authorities relied upon by defendant to sustain the point above stated.

This rule is followed without exception in the Federal Courts.

20 Am. Jur., Section 1099, p. 958 (See foot-

note 9, in which many Federal Court cases are cited).

In *Northern Assurance Co. v. Grand View Building Association*, 183 U.S. 308, 46 L. ed. 213, 227, the court states that this rule "has been treated by this court as unvariable and salutary."

Moreover, as stated in 20 Am. Jur., Section 1100, page 963, the rule "is not one merely of evidence, but is one of positive or substantive law founded upon the substantive rights of the parties." Consequently, "evidence properly falling within the inhibition of the rule does not become admissible merely because it has probative value or is not objected to." *McGregor v. Farmers-Merchants Bank*, 180 Wash. 440, 444, 40 P.(2d) 144.

V.

The Provision in the Agency Agreement that Either Party May Terminate it Without Cause Is Not In Fact "Contrary and Repugnant to the Express and Implied Intentions" of the Parties, and as a Matter of Fact and Law is not Oppressive or Against Public Policy.

Plaintiff alleges (Par. IV, Third Cause of Action, R. 36) that the provision in the agency agreement that either party had the right to terminate it without cause "is contrary and repugnant to the express and implied intentions of the contracting parties and is so oppressive to the plaintiff that it is against public policy."

It is the position of the defendant (1) that it appears conclusively from the plain, unambiguous and

comprehensive provisions of the written agency agreement that the parties intended to agree and did agree specifically and in writing that either party had the right to terminate the agency agreement with or without cause, and that obviously there was not and could not be an "implied intention" to the contrary; and (2) that as a matter of law neither said provision nor any other provision in the agency agreement or Nylic 2 is oppressive or against public policy.

In each of the following cases the identical form of agency agreement and Nylic 2 which are before the court in the instant case were considered and enforced:

Moser v. New York Life Ins. Co. (C.C.A. 9) 151 F.(2d) 396;

Bone v. New York Life Ins. Co. (Minn. 1925) 206 N.W. 452;

Russell v. New York Life Ins. Co., 261 N.Y. S. 943;

Schwartz v. New York Life Ins. Co., 286 N.Y.S. 873.

These cases are the only cases of record so far as we know in which a court has had before it the identical forms of agency agreement and Nylic 2 which are here before the court. In each of these cases the court considered as valid all of the provisions of the agency agreement and Nylic 2 which were then in controversy. In none of them did the court either directly or indirectly hold or suggest that any provision of the agency agreement or Nylic was oppressive or against public policy even though a termination

of the agency agreement by the company, in accordance with the provisions thereof, caused the agent to lose renewal commissions or Nylic benefits which he had been receiving.

In the instant case the termination of the agency agreement did not cause plaintiff to lose any renewal commissions, Nylic monthly payments or the Senior Nylic benefits, which he was entitled to receive in accordance with the provisions of the agency agreement and Nylic 2. These, as before pointed out, are not involved in this litigation. Senior Nylic payments have been and now are being paid plaintiff in accordance with the provisions of Nylic 2.

In cases in which a court has been called upon to consider the question, it has been uniformly held that a provision for termination of an agency agreement without cause was not oppressive or inequitable or against public policy even though such a termination had the legal effect of terminating the agent's rights to renewal commissions or to benefits or bonuses to which the agent would have been entitled if the agreement had not been terminated.

Butler v. New York Life Ins. Co., 45 Wash. 141, 87 Pac. 1119;

McPherrin v. Sun Life Assur. Co. of Canada (Iowa 1934) 257 N.W. 316;

Andrews v. Public Savings Ins. Co. of America (Ind. 1923) 141 N.E. 646;

Barr v. Sun Life Assur. Co. of Canada (Fla. 1941) 200 So. 240;

Wallace v. American Life Ins. Co. of Des Moines, Iowa, 237 Pac. 976;
Sutherland v. Connecticut Mutual Life Ins. Co., 149 N.Y.S. 1008, 1012.

Petitioner complains about the rule of Nylic which provides that Senior Nylics shall receive the monthly payments agreed upon so long as they live "provided only they shall not enter the service of another life insurance company."

It is deemed appropriate to point out the following facts about which there is and it is believed there reasonably can be no controversy:

There is no restriction in any of the agency agreements or Nylic 2 which prevents plaintiff from selling insurance for any other life insurance company. He is free to do precisely as he pleases. He is not deprived of the "right to earn a livelihood."

There is no issue in respect of plaintiff's Senior Nylic benefits. He is not here complaining that these have not been paid. He is not charging that defendant has refused to pay them or that defendant is claiming the right to stop payment.

Plaintiff alleges that he has not entered the service of any other life insurance company and he does not allege that he has any desire to do so.

This is not an action for a declaratory judgment in which plaintiff sees or may obtain a judicial determination of the legal effect of a violation by him of the said provisions of Nylic 2.

VI.

"Other than the Services to be Performed" There Was No Consideration Passing from Plaintiff to Defendant which may be Considered as a Legally Sufficient Consideration for an Agreement to Employ Plaintiff for Life.

The rule universally recognized is that a contract for permanent employment, for life employment, or for other terms purporting permanent employment, where the employe furnishes no consideration additional to the services incident to the employment, is nothing more than an indefinte general hiring, terminable at will of either party. A discharge of such an employe does not constitute a breach of the contract. The employe may not be awarded damages on account of such a discharge.

As stated by the Washington Supreme Court in *Heideman v. Tall's Travel Shops, Inc.*, 192 Wash. 513, 516, 518; 73 P.(2d) 1323:

> "But if it be assumed that there was otherwise evidence enough to submit the question of decedent's life employment to the jury, the agreement would be unenforceable for want of any consideration moving to the appellant to support it other than the rendition of service by the decedent.
>
> "In *Minter v. Toole, Campbell Dry Goods Co.*, 187 Mo. App. 16, 173 S.W. 4, the plaintiff was employed by the defendant for a term which he supposed to be permanent. Discharged some two years thereafter, he brought an action to recover unpaid salary. In order to enter into the defend-

ant's employ, the plaintiff gave up another employment. The court said:

" 'The reported cases which deal with contracts of employment in commercial business, where no other consideration than a promise to perform the service passes from the employee to the employer, are almost unanimous in applying the general rule that the words permanent, lasting, constant, or steady, applied to the term of employment do not constitute a contract of employment for life, or for any definite period, and such contracts fall under the rule "that an indefinite hiring at so much per day, or per month, or per year, is a hiring at will and may be terminated by either party at any time, and no action can be sustained in such case for a wrongful discharge." * * *

" 'The general rule that the assurance of permanent employment will be construed as meaning an indefinte, as distinguished from a special, or merely temporary employment, is a common sense inference founded upon common knowledge of the customs and usages of business. The effort of plaintiff to show an additional consideration passing from him to defendant was abortive since it shows that he merely abandoned other activities and interests to enter into the service of defendant—a thing almost every desirable servant does upon entering a new service, but which, of course, cannot be regarded as constituting any additional consideration to the master.'

* * * * * * * *

(Page 518)—"The case of *Carnig v. Carr*, 167 Mass. 544, 46 N. E. 117, 57 Am. St. 488, 35 L.R.A. 512, is sometimes cited in support of the

view that the rendition of service coupled with the giving up of another employment, constitutes a consideration for permanent or life employment. But in that case the plaintiff was a competitor of the defendant and gave up a business and sold his stock in trade to the defendant, who agreed, in turn, to give the plaintiff permanent employment at a stated salary; the defendant thereby getting rid of his competition in business. As said in *Skagerberg v. Bladin Paper Co.*, 197 Minn. 291, 266 N.W. 872, 'The resulting situation amounted to the same thing in substance and effect as if plaintiff had purchased his job'."

This rule is also recognized and followed in *Gensman v. West Coast Power Co.*, 3 Wn.(2d) 404, 412, 101 P.(2d) 316, wherein the court stated:

"On the issue of respondent's life employment, we are clear that the court's finding should be sustained. Accepting the respondent's evidence at face value, the assurance given by Watson meant no more than that there would be a steady job for him so long as conditions were mutually satisfactory and there was work for him to do. *Heideman v. Tall's Travel Shops*, 192 Wash. 513, 73 P.(2d) 1323."

"In the annotation to *Rape v. Mobile & O. R. Co.*, 136 Miss. 38, 100 So. 585, found in 35 A.L.R. 1422, 1432, it is said:

" 'In most of the jurisdictions passing on the duration of a contract purporting to be for permanent employment, it is held that, in the absence of additional express or implied stipulation as to the duration of the employment or of a good consideration additional to the services contracted to be rendered, a contract for permanent

employment, for life employment, for as long as the employee chooses, or for other terms purporting permanent employment, is no more than an indefinite general hiring terminable at the will of either party'."

See also:

Heaman v. Rowell Co., 261 N.Y. 229, 185 N.E. 83 (For facts see 258 N.Y.S. 138);

Foster v. Atlas Life Ins. Co. (Okla.) 6 P. (2d) 805.

Here, as affirmatively shown by the allegations in the amended complaint, and by plaintiff's exhibits, there was in fact no consideration passing from plaintiff to defendant other than the services to be performed by plaintiff. Plaintiff's claim that in 1908 he "gave up his banking position" is not enough. Nor is plaintiff's claim that he rendered continuous service enough. Obviously, under the facts here the continuity of plaintiff's employment was not an additional consideration passing from him to the company.

Moreover, here it affirmatively appears that there was no contract for permanent employment or life employment, as before pointed out. The contract of employment provided specifically that it was terminable at the will of either of the parties.

Here it conclusively appears that there was no express or implied stipulation that plaintiff was to be employed permanetly, or for life, or as long "as he remained a Nylic." The stipulation was specifically to the contrary. Nor was there any consideration in addition to the services to be performed.

VII.

Alleged Contracts for Life Employment Are So Unusual that the Burden Is Upon the Person Claiming Under Such a Contract to Allege and Prove Clearly and Unmistakably Explicit Authority in the Representatives of the Alleged Corporate Employer to Make Such a Contract in its Behalf.

There is no allegation in the First Amended Complaint and no charge in the Bill of Particulars that the alleged life employment contract asserted by plaintiff was authorized by defendant's board of directors or by an officer having specific authority from the board of directors to do so, or that defendant had power to make such a contract.

In paragraph V. of the First Cause of Action plaintiff alleges that the oral representations upon which he relies were made by "agents of defendant corporation." In the Bill of Particulars (R. 120) plaintiff identifies these agents.

Name	*Position*
L. Seton Lindsay	Agency Director
Gilbert A. Smith	Inspector of Agencies
E. R. Perkins	Vice-president
Thomas A. Buckner	Vice-president
Robert E. Dedell	Secretary of Clubs

In paragraph III of the Third Cause of Action plaintiff refers to "express and implied promises and representations made by defendant and its agents to plaintiff." In the Bill of Particulars (R. 121-123) plaintiff identifies the "defendant's agents alleged by

plaintiff to have made promises and representations which defendant violated and the positions of such agents" as follows:

Name	*Position*
L. Seton Lindsay	Agency Director, Superintendent of Agencies and Vice-president
Gilbert A. Smith	Inspector of Agencies
E. R. Perkins	Vice-president
Thomas A. Buckner	Vice-president
Robert D. Dedell	Secretary of Clubs and Field Secretary
A. S. Elford	Agency Director and Inspector of Agencies
Walker Buckner	Vice-president
James M. Hudnut	Assistant Secretary
Robert E. Whitney	Inspector of Agencies
C. A. Lewis	Contract Registrar
E. E. Andrews	Agents Councilor

There is no allegation or charge in the First Amended Complaint or in the Bill of Particulars that the board of directors of the defendant corporation ever authorized or ratified a contract for life employment of plaintiff, or that it had authority to do so.

Consequently, it appears that apart from all other considerations plaintiff would fail to establish a cause of action even though he proved all the facts alleged. He would establish only an unauthorized contract of hiring, if any, not enforceable against the corporation, for the reasons set forth in the leading case of *Heaman v. E. N. Rowell Co., Inc.*, 261 N.Y. 229, 185 N.E. 83, in which the court states as follows:

"The action is one to recover damages for an alleged wrongful discharge of plaintiff from the employ of defendant.

"The question is whether an allegation in the complaint that an oral contract of employment for life by a corporation was made through its president, can be upheld as sufficient in law. That a contract for employment for life if authorized by the corporation and based on an adequate consideration, will ordinarily be sustained admits of no dispute. *Riefkin v. E. I. DuPont de Nemours & Co.*, 53 App. D.C. 311, 290 F. 286; *Arentz v. Morse Dry Dock & Repair Co.*, 249 N.Y. 439, 444, 164 N.E. 342, 62 A.L.R. 231. Alleged contracts of life employment are, however, so unusual as to have been, with rare exceptions, condemned by the courts as unreasonable and unauthorized. The president or other executive officer of a corporation has no authority as such to make a contract that one should remain in the corporate employ for life even under a general power 'to appoint, remove and fix the compensation of employees.' That any board of directors or other persons responsible for the management of a corporation should give such unusual power to an executive officer cannot be implied. Plain language of the managing board, clearly showing that such was the intention of the corporation, coupled with power actually or impliedly vested in the corporation itself, must be found to justify such a hiring. *Carney v. New York Life Ins. Co.*, 19 App. Div. 160, 161, 45 N.Y.S. 1103, affirmed, 162 N.Y. 453, 57 N.E. 78, 49 L.R.A. 471, 76 Am. St. Rep. 347; *Alexander v. Equitable Life Assur. Soc.*, 233

N.Y. 300, 135 N.E. 509; *Clifford v. Firemen's Mut. Benefit Ass'n. of City of New York*, 232 App. Div. 260, 249 N.Y.S. 713, affirmed 259 N.Y. 547, 182 N.E. 175; *Davidson v. Library Bureau*, 234 App. Div. 47, 254 N.Y.S. 95, modified 259 N.Y. 654, 182 N.E. 221.

"The complaint does not suggest that the board of trustees of the defendant corporation ever authorized or ratified the contract set forth in the complaint. Plaintiff rests entirely on the affirmative allegation that the contract was made 'through the president.' If the plaintiff proved the facts alleged and nothing more he would fail to establish a cause of action. He would establish an unauthorized contract of hiring, not enforceable against the corporation."

See also:

Seiss v. McClintic-Marshall Corp., 188 Atl. 109;

Beaton v. Continental Southland S. & L. Association, 101 S.W.(2d) 905;

Heideman v. Tall's Travel Shops, Inc., 192 Wash. 513, 73 P.(2d) 1323;

Foster v. Atlas Life Ins. Co. (Okla.) 6 P. (2d) 805.

VIII.

The Allegations in the Third Cause of Action Do Not State a Claim Upon which the Court May Enter a Judgment Reforming the Agency Agreement (Exhibit "D") or Grant Plaintiff any other Equitable Relief.

In the Third Cause of Action plaintiff seeks to obtain a reformation of the agency agreement, Ex-

hibit "D", by striking from Section 20th of the agreement the words "either party hereto may without cause terminate this agreement upon thirty days written notice" and then seeks to recover $485,864.42 as damages on account of an alleged breach of the agreement as reformed.

It is the position of the defendant that the allegations in the Third Cause of Action are not sufficient to sustain a decree for reformation or a judgment for damages as prayed.

There is no allegation of fraud, bad faith or inequitable conduct in respect of the execution of the agency agreement dated December 31, 1927, which is in fact the only agency agreement involved in this litigation, or in respect of the execution of the prior agency agreement dated August 17, 1910, or in respect of Nylic 2.

The only allegation is a conclusion of the pleader that the provision in the written agency agreement dated December 31, 1927, granting either party the right to terminate the agreement upon thirty days written notice is "contrary and repugnant to the express and implied intentions of the contracting parties" and "is so oppressive to plaintiff that it is against public policy."

There is no allegation of mutual mistake. As stated in *John Hancock Mutual Life Ins. Co. v. Agnew*, 1 Wn.(2d) 165, 176, 95 P.(2d) 386:

> "When no question of fraud, bad faith or inequitable conduct is involved, and the right to

reform an instrument is based solely on a mistake, it is necessary that the mistake be mutual and that both parties understood the contract as the complaint or petition alleges that it ought to have been and as in fact it was except for the mistake. * * *

"Where any doubt exists as to the intent of the parties, reformation will not be granted. * * *"

There is no allegation that the written words in the agency agreement contain the real intention of neither of the parties. As stated by the court in *Anderson v. Freeman*, 88 Wash. 608, 153 Pac. 307:

"Those who seek to reform an instrument on account of mutual mistake must do so by language clear and convincing besides showing that the written words contain the real intention of *neither* of the parties. *Moore v. Parker*, 83 Wash. 399, 145 Pac. 440. Where there is no fraud, and one party believes that he is getting by the document what he for his part intended to get, the thing cannot be undone by the other. * * *"

Having signed and accepted the written agency agreement of December 31, 1927, and having obtained the benefits thereof and having served thereunder as an agent of the defendant for eight and one-half years, plaintiff may not now claim to have been misled concerning its contents or to be ignorant of what was specifically provided therein. As stated by the court in *Kelley v. von Herberg*, 184 Wash. 165, 50 P.(2d) 23:

"We have always held that a party whose

rights rest upon a written instrument which is plain and unambiguous, and who has read or had the opportunity to read the instrument, cannot claim to have been misled concerning its contents or to be ignorant of what is provided therein."

IX.

Neither as a Matter of Fact Nor as a Matter of Law Was there any Fiduciary Relationship Between Defendant and Plaintiff, as Asserted by Plaintiff.

Petitioner's alleged Third Cause of Action does not come within any exception to the foregoing rules.

Plaintiff argued in the District Court that "where a fiduciary or confidential relationship exists there is no necessity to allege fraud, deception, duress, disability, mistake or undue influence." None of the authorities cited by plaintiff indicated that any court has ever held that the relationship between an insurance company and its soliciting agent, such as was the relationship between defendant and plaintiff, is in any respect a fidicuiary relationship. We submit that there is no authority at all for such an assertion.

Nor is there any fact alleged or suggested in the instant case which warrants a belief that plaintiff "reposed" any confidence in defendant or that defendant exercised the slightest "domination" over plaintiff.

To the contrary, here it appears conclusively from the allegations of the Complaint, as supplemented by

the Bill of Particulars, that no fidicuary relationship which could be recognized as such by any court existed between plaintiff and defendant.

Plaintiff was an insurance agent, employed only as a soliciting agent. Obviously the relationship between plaintiff and defendant was nothing more than the normal and traditional relationship which exists between any principal and a soliciting agent in the life insurance business. There is no allegation that defendant ever acted or purported to act as an agent of plaintiff, or purported to represent or to act for or in behalf of plaintiff in any capacity. If any such charge were made, it could not be accepted as true. Plaintiff and defendant were dealing at arm's length and there is no allegation of fact to the contrary. Nor is there any charge that petitioner was under a disability which imposed some unusual duty upon defendant to protect plaintiff. Nor is there any allegation of fact which could possibly indicate the existence of a relationship between plaintiff and defendant which impelled or induced plaintiff to relax the care and vigilance which he otherwise should and ordinarily would exercise. The relationship was only a normal and traditional business relationship.

On principle, it is submitted, the position of defendant is sound. It is also sustained by the authorities.

In *Collins v. Nelson*, 193 Wash. 334, 345, 75 P. (2d) 570, the action was brought to recover for the loss of money paid by plaintiff on two promissory

notes which were given in the purchase of certain mining stock which was placed in escrow with the defendant. The facts, as in most such circumstances, are extremely complicated. For present purposes it is enough to say that the plaintiff had had some further business transactions with the defendant; that there was testimony of a conversation between the parties in which defendant guaranteed to see that the stock was put up in escrow, and that in paying the notes plaintiff relied upon defendant's promise, and believed that the stock had been placed in escrow with the defendant as escrowee; that a copy of the escrow agreement, naming defendant as escrowee, was forwarded to the defendant; and that at the time of the payment of the notes defendant knew that the stock had not been placed in escrow as agreed.

Plaintiff contended that the action was for fraud and deceit. The theory was that a confidential relation existed between plaintiff and defendant, and that it was the duty of defendant, at the time plaintiff paid the notes, to inform plaintiff that the stock was not in defendant's possession, nor ready for delivery. In holding that no confidential relation existed, the court said:

> "The court did not find, nor are we able to discover from the evidence, that there was any confidential relation existing between Nelson and Collins. It is true that there had been some social contact and friendly relations, as well as one prior business transaction between them, but

there was no relation which, in law, could be said to be confidential. The social relations were casual, and the prior business deal involving the sale by the one and the purchase by the other of certain stock had been conducted at arm's length.

"To establish a fiduciary relationship upon the violation of which fraud is sought to be based, there must be something more than mere friendly relations or confidence in another's honesty and integrity. *There must be something in the particular circumstances which approximates a business agency, a professional relationship, or a family tie, something which itself impels or induces the trusting party to relax the care and vigilance which he otherwise should, and ordinarily would exercise.*" (Italics supplied.)

In *Cranwell v. Oglesby*, 12 N.E.(2d) 81, the Supreme Judicial Court of Massachusetts, quoting from one of its earlier decisions, states the fundamental requirement to be as follows:

" 'Mere respect for the judgment of another or trust in his character is not enough to constitute such a relation. There must be such circumstances as indicate a just foundation for a belief that in giving advice or presenting arguments one is acting not in his own behalf, but in the interests of the other party. If the relation is a business one, the existence of the mutual respect and confidence does not make it fiduciary'."

In *Van Dale v. Prudential Ins. Co. of America* (Wis. 1937) 274 N.W. 153, the action was initiated by the plaintiff to recover disability benefits under

four life insurance policies which had been issued to him by the defendant, notwithstanding the fact that plaintiff had theretofore, in consideration of the payment to him of the sum of $5,110.20 (disability payments for eighteen months), surrendered two of the policies for cancellation, and the other two policies for reissue with the disability clauses eliminated therefrom. The plaintiff alleged that the surrender of the policies was induced by fraudulent representations upon which he relied.

It appeared that plaintiff had also been a soliciting agent for the defendant company for some years, as a result of which it was contended that a confidential or fiduciary relationship existed between the plaintiff and the defendant. On this point the court said:

> "The trial court was of the opinion that a confidential or fiduciary relationship existed between the plaintiff and the defendant. We see no warrant for such a conclusion. True, the plaintiff had been in the employ of the defendant for a number of years, had been a valued employee, had enjoyed and received the approbation of his employer, and rightly had faith and confidence in the defendant company, but those facts did not create a fiduciary relationship, * * *."

Under the allegations relied upon by Petitioner and the foregoing authorities it is submitted that it conclusively appears that there was no fiduciary relationship between Petitioner and Respondent.

X.

If the Agreement Relied Upon by Plaintiff Be Considered and Construed (Contrary to the Facts) as a Separate Contemporaneous Oral Agreement, it would be Void under the Statute of Frauds.

It appears conclusively that the representations relied upon by plaintiff as alleged and as set forth in the bill of particulars were oral. It is charged that they were made and relied upon by plaintiff prior to plaintiff's application for membership in Nylic (August 17, 1910). The representations as alleged and set forth in the bill of particulars are that if "a Nylic system" were reinstated by defendant "plaintiff would have an opportunity to qualify for a life career in the insurance business with defendant, *provided plaintiff could survive the requirements of defendant for the first 20 years during which period an agent could be discharged with or without cause.*" (Paragraph VI First Cause of Action, R. 28-29, bill of particulars, R. 119). (Italics supplied.)

Obviously the alleged agreement could not possibly have been performed prior to December 31, 1927, which is more than 17 years after it is claimed by plaintiff that the alleged representations were made.

It follows that if the agreement relied upon by plaintiff be considered and construed to be a separate contemporaneous oral agreement, which it was not, it would be void under the statute of frauds because it conclusively appears that it could not have been

performed under any circumstances within one year from the making thereof. Such an agreement is void.

Rem. Rev. Stat. of Washington, Sec. 5825;
Fredenburg v. Fredenburg, 288 N.Y.S. 377;
Union Savings & Trust Co. v. Krumm, 88 Wash. 20, 152 Pac. 681;
Hendry v. Bird, 135 Wash. 174, 237 Pac. 317;
Brock v. Button, 187 Wash. 27, 59 P.(2d) 761.

The recognized rule is that when the bar of the action by the statute of frauds appears "on the face of the pleading," the question may be raised on a motion to dismiss for insufficiency under Rule 12(b).

In *Kahn v. Cecelia Co.* (District Court, S.D. New York) 40 F. Supp. 878, 879, the rule is stated:

> "Just prior to the argument of the motion, the parties, by written stipulation, limited its scope to a single question, namely, whether the first cause of action should be dismissed 'on the ground that said first cause of action is barred by the Statute of Frauds.'
>
> "Under Rule 8(c) of the Federal Rules, 28 U.S.C.A. following section 723c, the Statute of Frauds is an affirmative defense to be pleaded, *Piest v. Tide Water Oil Co.*, D.C., 27 F. Supp. 1020, but where the defect appears on the face of the pleading the question may be raised on motion to dismiss for insufficiency under Rule 12(b), Moore's Federal Practice, § 12.04, pp. 644-647."

Before closing this part of the brief it is believed

appropriate to point out that normally there is some reason for every termination of an agency agreement and that in many cases there may be reasons for a termination not susceptible of proof to the satisfaction of a jury. Consequently, it is not unreasonable or unusual for an employer to protect himself against an undesirable agent by a provision permitting a termination of the agreement at will, upon notice, so as to avoid making a jury the sole judge of the competency or loyalty or integrity of the agent.

In the instant case the right to terminate the agreement was mutual. Plaintiff could have resigned at will and deprived defendant of his services after years of training.

It is respectfully submitted that it conclusively appears from the allegations in the First Amended Complaint, and the exhibits and Bill of Particulars which are a part thereof, (1) that defendant had the right to terminate plaintiff's employment, as specifically provided in the agency agreement of December 31, 1927; (2) that there was no breach by defendant of the agency agreement or Nylic 2 or any other agreement, and no violation by defendant of any duty owed by it to plaintiff; (3) that the Third Cause of Action does not state a claim under which the court could enter a decree reforming the agency agreement (Exhibit "Б") or grant plaintiff any other equitable relief as prayed; (4) that the allegations in the Third Cause of Action do not state a claim under which the court could enter judgment

in favor of the plaintiff in any sum for damages claimed to have been suffered by reason of the termination of plaintiff's employment, and (5) that the judgment of dismissal entered by the District Court was right and correctly affirmed by the Circuit Court of Appeals.